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No. _____

In The

Supreme Court of the United States

ROBERT HORTON, NATIONALIST TELEVISION, a Texas Non-Profit Corporation; and BARRY HACKNEY,

Petitioners

vs.

CITY OF HOUSTON, TEXAS and ACCESS HOUSTON CABLE CORPORATION,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a rule for the charging of selective, arbitrary and standardless fees for the broadcasting of non-locally-produced programs over public-access cable-television, which constricts diversity of information sources and services, necessarily considering content, violates the Cable Television Policy Act of 1984, the Equal Protection Clause of the Fourteenth Amendment and the First Amendment, is invalid on its face or as applied.

PARTIES TO THE PROCEEDINGS

Petitioners

Nationalist Television, a Texas non-profit corporation; Robert Horton; and, Barry Hackney.

Respondents

City of Houston, a Texas municipal corporation, and Access Houston Cable Corporation, a Texas corporation

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Nationalist Movement, by and through counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

OPINIONS BELOW

The unpublished ruling of the United States Court of Appeals for the Fifth Circuit from which certiorari is sought is contained in *Robert Horton, Nationalist Television and Barry Hackney v. City of Houston and Access Houston Cable Corporation,* No. 03-20450, at Appendix "A," dated March 17, 2004, with Judgment dated April 8, 2004, at Appendix "B," affirming judgment of the United States District Court for the Southern District of Texas, Houston Division, in *Robert Horton, Nationalist Television and Barry Hackney v. City of Houston and Access Houston Cable Corporation,* Civ. Action No. H-92-CV-3451, dated March 31, 2003, at Appendix "C," pursuant to remand of the United States Court of Appeals for the Fifth Circuit in *Robert Horton, Nationalist Television and Barry Hackney v. City of Houston and Access Houston Cable Corporation,* 179 F.3d 188 (5th Cir.1999), at Appendix "D," dated June 18, 1999, which reversed and remanded *Robert Horton, Nationalist Television and Barry Hackney v. City of Houston and Access Houston Cable Corporation,* Civ. Action No. H-92-CV-3451, at Appendix "E," dated October 16, 1997.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 *USC* §1254(1) and 2106.

❖

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.1, Petitioner, Nationalist Television, states that it is a Texas non-profit corporation, having no parent corporation. It has no subsidiaries.

❖

CONSTITUTIONAL PROVISIONS

Amendment I, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

47 *USC* §521, Cable Television Policy Act of 1984

PURPOSES

The purposes of this subchapter are to -

(1) establish a national policy concerning cable communications;

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

....

47 *USC* §522, Cable Television Policy Act of 1984

DEFINITIONS

For purposes of this subchapter -

...

(15) the term "public, educational, or governmental access facilities" means -

(A) channel capacity designated for public, educational, or governmental use; and

(B) facilities and equipment for the use of such channel capacity;

....

47 *USC* §531, Cable Television Policy Act of 1984

CABLE CHANNELS FOR PUBLIC, EDUCATIONAL, OR GOVERNMENTAL USE

...

(e) Editorial control by cable operator

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section.

....

LOCAL RULES OF PROCEDURE

ACCESS HOUSTON

2.A-5 PROGRAM CONTRACT AND RESPONSIBILITY: Before access programs are scheduled for cable-cast, the access program provider must sign a Program Contract which holds the program provider liable for content of the program and pay all applicable fees. In signing the Program Contract, the program provider agrees in writing that his or her program does not include any form of "constitutionally unprotected speech."

The said fees are set out on Page Three of the said Rules & Procedures, styled:

The Public Access Channel Fees:

Program Distribution	
Programs Produced Locally	
Individuals & Organizations	FREE
Programs Produced Elsewhere	
Individuals	$75 / hr
Organizations	$100 / hr

STATEMENT OF THE CASE

Petitioners Barry Hackney and Robert Horton, as residents of Houston, Texas, desired to broadcast documentary and news programs over the Houston public-access cable-television channel. Petitioner, Nationalist Television, domiciled in Houston, is a non-profit charitable and educational corporation, which produces the programs, entitled *Airlink,* in Mississippi.

The content of *Airlink*, which is not obscene, has been described by Petitioners as "pro-majority," by Respondents as "white supremacist," App. 37, and by others as "controversial." Content comes from many diverse sources, outside of Houston city-limits. Respondents imposed a $100.00 per-hour fee to broadcast "non-locally produced" programs, App. 59. Horton, who refused to pay the fee, and Hackney, who was unable to afford the fee, commencing litigation to redress violations of the First and Fourteenth Amendments and the Cable Act.

The trial court granted summary judgment in favor of Respondents on the grounds that there was no evidence that Respondents had acted arbitrarily. On appeal, the decision was reversed and remanded on the grounds that the regulation was content-neutral, but that Respondents had failed to show that the regulation was narrowly tailored to avoid abridging the First Amendment. The appeals' court in *Horton I* concluded that insofar as the First Amendment was impacted, the trial court should not simply "rubber-stamp" the regulation, but agonized that "[m]uch is uncertain about the scope of First Amendment benefits and bur-

dens in the cable industry," App. 54.

The holding was that public-access was a public forum, subject to "intermediate" scrutiny, rather than akin to a *traditional* public forum, subject to "strict" or "heightened" scrutiny. Under the "intermediate" scrutiny test, on remand, the trial court held that the fee conferred some benefit and, therefore, was narrowly-tailored and promoted "localism," rather than having to conclude that a "compelling state interest" was required to be served, had the standard akin to the traditional public forum been required. On appeal in *Horton II*, the appeals' court affirmed that the fee was "narrowly-tailored" to promote "localism."

Public-access is funded by the municipality, initially at some $500,000.00 per year, which now has reached some $900,000.00 per year, App. 21. There is no scarcity of airtime, App. 21, 25, and programs are repeated four or more times. *Airlink* comes "pre-packaged," requiring no additional facilities or overhead to broadcast. There are no standards or guidelines for the charging of fees or the differentiation of amounts of fees between "individuals" and "organizations."

Initially, *Airlink* had sought to broadcast its weekly show beginning during the Republican National Convention, held in Houston in 1992. News accounts labeled it "white-supremacist." The program was banned, ostensibly for non-payment of "non-locally-produced" fees. But, after the first court-hearing, the ban was lifted and the program was broadcast for several weeks, App. 15-16, into 1993, until a program was tendered criticizing homosexu-

ality in the Army, at which time the show was booted, again.

The Executive Director had testified, initially, that the fees for non-locally-produced programming were not needed and should be abolished, App. 50. In 1998, the fees were ostensibly abolished; however, other fees were imposed in their place, App. 8.

The case is timely brought here to address the matter of first-impression of whether public-access is akin to a traditional public forum, subject to heightened scrutiny under the First Amendment, and whether "localism" could be effected in a less intrusive manner than by the imposition of standardless and arbitrary fees.

REASONS FOR GRANTING THE PETITION

Cable-television is a new medium, only some two-decades old. Public-access, which allows ordinary, local citizens to produce shows and air their views, has been a valuable and far-reaching part of the medium. Congress has anticipated the growth of the medium[1] and attempted to assure that the availability to the public of a diversity of views and information through cable television be promoted,[2] with public-access available on a first-come-first-served basis. However, at this critical juncture in the development of public-access, the City of Houston and its public-access operator have imposed fees, which have excluded some local residents from broadcasting. The pretext has been to "raise revenue," App. 18, 32, from local residents whose programs are "produced" outside the city, but the effect has been to preclude "controversial" programming. And, should the fee-scheme proliferate, public-access will no longer be meaningfully "public" nor afford genuine "access," except to those who may be able to afford to pay.

Public-access has already been regarded as a public forum, but the Fifth Circuit seemed perplexed that defini-

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[1] "Greater demand" anticipated, *HR Rep.* 98-934, 98th Cong. Sess. 46 (1984) (urging franchising authorities to combine access channels until great demand develops).

[2] Congressional Findings and Policy, Pub. L. 102-385, Sec. 2(a), (b), Oct. 5, 1992, 106 Stat. 1460, 1463(b)(1).

tive guidance from this Court was lacking as to the full extent of the forum. Petitioners seek to construe public-access as akin to the Internet and a public-access broadcaster as the same "town-crier" as the Internet-publisher, to the end that speech may not be abridged, except for a compelling governmental interest. A retrenchment, now, would not only abrogate the letter and spirit set out by Congress in the Cable Act, but adversely impact strong national policy, under the First Amendment, that discussion of public-issues in the public forum be wide open and robust [3].

Granting the Writ will also give the Court an opportunity to review and, hopefully, reverse the establishment of a fee-mechanism which caters to the wealthy in a public forum, in a manner which the Court has, time and again, denounced. Striking down fees, whether grounded upon the rationale of a "tax upon knowledge," as in *Murdock v. Pennsylvania*,[4] 319 U.S. 105 (1943), which prohibits a fee for exercise of a constitutional right, or "arbitrary conduct," as in *Forsyth County, Georgia v. The Nationalist*

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[3] There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[4] *See also Jones v. Opelika*, 319 U.S. 103 (1943) (no license fee or tax upon exercise of the First Amendment); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (striking down $1.00 license fee).

Movement, 505 U.S. 123 (1992), which prohibits a fee as a potential for censorship by an administrator, guidance from the Court will surely be a powerful boost to public-access. Although some have suggested that this case is about "localism," which is in no wise under assault, it is more about the dissemination of ideas and the protection of free-speech.

PROPOSITION I

THE RULE FOR THE CHARGING OF SELECTIVE, ARBITRARY AND STANDARDLESS FEES FOR THE BROADCASTING OF NON-LOCALLY PRODUCED PROGRAMS OVER PUBLIC-ACCESS CABLE-TELEVISION, WHICH CONSTRICTS DIVERSITY OF INFORMATION SOURCES AND SERVICES, NECESSARILY CONSIDERING CONTENT, VIOLATES THE FIRST AMENDMENT AND IS INVALID ON ITS FACE OR AS APPLIED.

It would appear that but one standard, when the First Amendment impacts, might justify the limiting of public-access programming and diverse-views propagation. That would be a scarcity of facilities or airtime. *Cf. City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 492, 495 (1986) (physical scarcity of available space and lack of frequencies determinative). However, in the case at bar, there is no scarcity of airtime, App. 7, and no lack of facilities to broadcast. *Airlink* tapes are provided ready to be broadcast and there is no additional overhead involved, App. 24-25. If airtime were filled up with "locally-produced" programs and "non-locally-produced" shows

threatened to overwhelm them,[5] some rationing mechanism might be in order. But, there is no such scarcity.

It has been postulated that raising funds for the conducting of a "survey" or purchasing a piece of extra equipment "promotes" "localism," even though programs tendered by local residents unable to pay are kicked off the air. It has been said that such funds are "beneficial," App. 26-27. A similar contention was turned down in *Forsyth County*, 505 U.S. at 136, however, where it was argued that a fee had to be charged to offset police-costs in policing a public assembly. While the Court noted that "raising revenue" was an "important government responsibility," the charging of fees in derogation of the First Amendment could not be justified.

Although it has been argued that the "content" of the program is not considered, the potential[6] for abuse intrudes

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[5] As in *Chicago Cable Communications v. Chicago Cable Com'n*, 879 F.2d 1540 (7th Cir.1989), *cert. den.* 493 U.S. 1044 (1990).

[6] *See Forsyth County*, 505 U.S. at 132. Arbitrary application of a government regulation is

> *inherently* inconsistent with a valid time, place and manner regulation because such discretion has the *potential* for becoming a means of suppressing a particular point of view [emphasis added].

where the fee is charged, waived, withdrawn or reimposed, without guidelines[7] or without any reason being given. And, the Executive Director, alone, App. 16, 51-54, weighs the facts to make such determination, *see e.g. Boos v. Barry*, 485 U.S. 312, 318-391 (1988) (content necessarily had to be considered to determine legality),[8] as he deems necessary to determine whether a broadcaster is an

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See also, City of Lakewood v. Plain Dealer Publ'g, 486 U.S. 750, 763 (1988) ("[The] danger [of a First Amendment violation] is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government. *Cf. Smith v. Goguen*, 415 U.S. 566 (1974) (for the potentiality for abuse when a measure has the *potential* to be administered in an arbitrary manner).

[7] *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973) ("reasonable" time, place and manner restrictions may not delegate standardless discretionary power to local functionaries).

[8] See also 47 *USC* §532(c)(2):

> A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming....

47 *USC* §521(4) expresses the will of Congress that "the widest possible diversity of information sources and services to the public" be assured on public-access.

"individual," subject to one fee, or an "organization," subject to another fee, or if he grants a waiver[9] of fees, at all. *Forsyth County*, 505 U.S. at 133, n. 10:

> The District Court's finding that, in this instance, the Forsyth County administrator applied legitimate, content-neutral criteria, even if correct, is irrelevant to this facial challenge. Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision.

If the case at bar dealt with, say, a locality charging a local hunter one fee and out-of-state hunters a higher fee, on the grounds that it would reduce an influx of hunters and help in conserving wildlife, who could quarrel? And, perhaps, under "intermediate" scrutiny, a similar finding might obtain. But, where a rule has a substantial risk[10] of

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[9] The on-again-off-again treatment, sometimes waiving the rule, sometimes attempting to enforce it, is plainly unconstitutionally arbitrary. *Cf. NAACP v. Button*, 371 U.S. 415, 438 (1963) ("precision of regulation" required for constitutionally protected activity).

[10] "Respondent mounts a facial challenge to the ... ordinance. It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation," *Forsyth County*, 505 U.S. at 129. *See also, The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L.Rev. 67 (1960).

eliminating certain ideas or viewpoints from the public dialogue based upon content, there must be strict scrutiny, *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642 (1994).

The Court has already found the Internet to be akin to the traditional public forum, *Reno v. ACLU*, 521 U.S. 844 (1997) (extrapolating from the proverbial soapbo), postulating that anyone with a phone line now had the capability to become a "town crier." It is not a far stretch to conclude that anyone with a video camera could do likewise.

In fact, but for the "maverick" ruling, below, it had generally been assumed that public-access was akin to the traditional public forum and, indeed, "*Free* TV," instead of "*Fee* TV."

> Cable systems were not permitted to charge for the use of airtime on the public access channel.

Public Access, The Free Access Channel Requirements, ¶15.03[1], *Telecommunications Regulations: Cable, Broadcasting, Satellite and the Internet*, Vol. 2, Charles D. Ferris, LexisNexis, Matthew Bender, Newark NJ (2002) (stressing the "public-interest" obligation). At every step of the way in the development of public-access, the FCC mandated "diverse channel users" be provided for and encouraged, finding "definite societal good" therefrom. *The 1976 Revision to the Access Rules, 1976 Report and Order*, ¶15.04, *Telecommunications Regulations: Cable, Broadcasting, Satellite and the Internet*, Vol. 2, Charles D. Fer-

ris, LexisNexis, Matthew Bender, Newark NJ (2002).

Such public policy was reiterated in 1984 that "public access channel [is to be] available on a first come, nondiscriminatory basis." *U.S. Code Congressional & Administrative News*, 98th Cong., Vol. 5 (1984), p. 4673.

The only requirement, until now, has been that a local sponsor was required, *Glendora v. Levin*, 24 Fed.Appx. 474, 2001 West Law 1587415 (6th Cir.2001). If a municipality did not wish to carry out its obligations, it could terminate public-access altogether, *cf. Warner v. American Cablevision of Kansas City, Inc.*, 699 F.Supp. 851 (D.-Kan.1988). Scholars, in discussing the "elusive" concept of the public forum in telecommunications, have suggested that *Forsyth County* applies to prevent an Administrator from being vested with sole and arbitrary authority to charge a fee for public-access, *Modern Communications Law*, Vol. 1, Harvey L. Zuckerman, *Access to Channels of Communication* 1.8, 137 A(2)(a), at 149, West Publishing Co., St. Paul, MN (1999).

Former FCC-Chairman Charles D. Ferris has called the medium a "speaker's corner" in a "classic public forum":

> Because public access channels set up a form of video "Speaker's Corner," they present a classic public forum, thereby limiting regulation to content-neutral, narrow-tailored, time, place and manner restrictions.

Federal Limits, ¶13.08, *Telecommunications Regulations:*

Cable, Broadcasting, Satellite and the Internet, Vol.1, 13-73, Charles D. Ferris, LexisNexis, Matthew Bender, Newark NJ (2002). *Accord, Missouri Knights of the Ku Klux Klan v. City of Kansas City*, 723 F. Supp. 1347 (W.D.Mo.-1989) (finding "public forum").

Public-access is, as the name implies, "public," under the *Cable Television Policy Act of 1984*, 47 *USC* §521 *et seq.* involving state-action. The intent of the Act, by its terms, is *to assure and encourage the widest possible diversity*[11] in cable communications, 47 *USC* §521(4). While

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[11] See the legislative history of the Cable Act, which created public access. *U.S. Code Congressional & Administrative News*, 98th Cong., Vol. 5 (1984), p. 4668.

> [A]ccess provisions contained in this legislation are consistent with and further the goals of the First Amendment.... which will foster the availability of a "diversity of viewpoints" to the listening audience....
>
> The goal of the First Amendment is to foster "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).
>
> > The interest in diverse sources of information is akin to, if indeed it is not the same as, the interest protected by the First Amendment....

examining the critical facts, *de novo*,[12] the Court is urged to bear in mind the goal that "optimum use is made of the cable medium in the public interest," *Community Communications Corp. v. City of Boulder*, 660 F.2d 1370, 1379 (10th Cir.1981).

> This interest has been recognized time and time again. In *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969), for instance, the Supreme Court observed that
>
> > [i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.
>
> As we enter the "information age," access to telecommunications networks has become increasingly important to full participation in the political, economic, social, and cultural life of the nation. The First Amendment's guarantee of a free flow of diverse ideas will be reduced to an empty promise if access to information is not available to all our citizens.

U.S. Code Congressional & Administrative News, 98th Cong., Vol. 5 (1984), p. 4673.

[12] See *Bose v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (independent examination of the record as a whole required)

"Localism" is of value, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir.1998). But in the context of this case, the nexus even of localism must be, Does the fee hinder the communication of ideas? In other words, look to substance over form. Would not the public-interest be well-served if Mr. Hackney, for example, presented a tape he had filmed of the Presidential Inauguration, just as much as if Mr. Horton presented a tape of the Mayoral Inauguration?

As the Court noted in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995), a newspaper may print an edited compilation of speech generated by other persons in its opinion pages. If the speaker or writer were in another locale, would the ideas be less-worthy or the First-Amendment less-encompassing? The same rationale would seem to apply to the airing of a videotape, if the subject-matter may be outside the city-limits[13] or the editing-machine in another state, so long as, of course, under the Cable Act, the sponsor is a local resident and no other local producers are disadvantaged or "local subjects" shunted aside, as a result.

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[13] The rules require that 51% of video be shot within the city-limits, App. 59. The administrator would, necessarily, be compelled to consider the content of the message sought to be conveyed to determine if the program were, therefore, "local," with no fees, or "non-local," for fees. *But see, Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (prohibition against consideration of content of message).

PROPOSITION II

THE RULE FOR THE CHARGING OF FEES FOR THE BROADCASTING OF NON-LOCALLY PRODUCED PROGRAMS OVER PUBLIC-ACCESS CABLE-TELEVISION, WHICH CREATES A CATEGORY FOR THOSE WHO CAN PAY TO BROADCAST VERSUS THOSE WHO CANNOT AFFORD TO PAY AND, THEREFORE, CANNOT BROADCAST, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A special status for would-be speakers based upon ability to pay has been impermissibly created. If "localism," that is to say the ability of local citizens to broadcast and focus on purely local topics, were adversely impacted, which it is not in this case, a less intrusive method[14] could be devised to remedy the problem, without a fee. But mandating that a local resident may not broadcast at all, if his video contains ideas in a setting, outside the city, App. 13, 59, unless he pays, not only excludes ideas from a very marketplace of ideas but shunts aside those who cannot afford to pay. *Cf. Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 123 (1973) (domination of the public agenda by the wealthy con-

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[14] The proper exercise of governmental authority is simply to assure the first-come, first-served priority of differing events ... seeking ... the same time, *cf. Cox v. New Hampshire*, 312 U.S. 569, 574-576 (1941).

demned). See also the legislative history of the Cable Act, *U.S. Code Congressional & Administrative News*, 98th Cong., Vol. 5 (1984), pp. 4672-73, where Congressional intent is summed up as:

> Public access channels available under H.R. 4103 would be available to all, poor and wealthy alike, thereby minimizing the Court's fear in *Democratic National Committee* of domination of the media by the wealthy.

This Court has already approved the concept of first-come, first-served:

> Congress ... may devise ... access that ... will afford increased opportunities for the discussion of public issues ... on a first come, nondiscriminatory basis.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 131 (1973), *cited in U.S. Code Congressional & Administrative News*, 98th Cong., Vol. 5 (1984), p. 4673. The Cable Act was said to have

> secured the First Amendment right of the viewers and listeners to a diversity of information sources, *id.*

The instant fee amounts to a tax on speech, rather than a promoter of "localism" and, as such, is intolerable. *See, e.g. Murdock*, 319 U.S. at 133 (1943) (any charge for exercise of First Amendment rights is unconstitutional).

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.

Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).[15] One is given to wonder if Petitioners had submitted a video of the Super Bowl, filmed in Florida, instead of a "controversial" message filmed in Mississippi, the fee-requirement would have been enforced against them?[16]

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[15] A proposition with which this brief-writer, personally and parenthetically, disagrees.

[16] *See Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984) (regulations permitting government discrimination on the basis of content of message cannot be tolerated under the First Amendment).

CONCLUSION

The Court has been diligent in assuring that the First Amendment does not lag behind technology in the Information Age. Cable-television and the Internet are the two major breakthroughs in modern communications which uniquely empower ordinary individuals to express ideas, not unlike the printing-press in earlier days. But for the impediment of overbroad, vague and chilling rule, which allows for the imposition of fees, public-access offers great promise. However, the fee-rule flies in the face of public-policy,[17] the will of Congress, clear precedent of this Court and constitutional guarantees, beckoning others to perhaps apply the same brakes which have driven certain "controversial" ideas off the air.

This is an important free-speech case, in which the lower courts have departed significantly from the content-neutrality doctrine clearly laid down by this Court, but in a manner and medium not yet full-addressed here. This case has broad implications for First Amendment rights, for if state actors are permitted to constrict this Court's clear mandate that a regulation's potential for abuse of the First Amendment will be considered in any facial chal-

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[17] *Compare, Connick v. Myers*, 461 U.S. 138 (1983) (public-issue speech ranked as highest-rung of First-Amendment values) with *Forsyth County*, 505 U.S. at 136 (progression of constitutional law relied upon "[i]n light of the Court's subsequent First Amendment jurisprudence").

lenge, there will be virtually no end to the schemes, diversions and ruses to thwart Congress' clear intent that public-access broadcasting be wide-open and robust, on a first-come, first-served basis.

If unbridled discretion is permitted to creep back into the marketplace of ideas, so that those regulating public-access programming may consider – actually or necessarily – the content of speech, the profound national commitment to wide open and robust discussion of public affairs will take a galling step backward. If a charge is allowed to be placed upon those seeking to exercise free speech over the public-access channels, with no compelling governmental reason for such a fee, the First Amendment will become more of a privilege than a right, and evermore ineffective, especially for the poor. The Court has not, as yet, denominated public-access as a public-forum akin to the traditional public-forum. But that time has come.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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Appendix 1

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20031

ROBERT HORTON, NATIONALIST TELEVISION, a Texas Non-Profit Corporation; and BARRY HACKNEY,

Plaintiffs-Appellants,

versus

CITY OF HOUSTON, TEXAS and ACCESS HOUSTON CABLE CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
H-92-CV-3451

March 17, 2004

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

Appendix 2

PER CURIAM:[1]

After reviewing the record created on remand and considering the briefs of the parties and argument of counsel, we are satisfied that the district court properly carried out our remand instructions. We also conclude that the district court did not err in concluding that the fee in question was narrowly tailored to achieve the legitimate objective of promoting localism. We therefore affirm the judgment of the district court.

AFFIRMED.

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[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-20450

D.C. Docket No. H-92-CV-3451

ROBERT HORTON; NATIONALIST
TELEVISION, a Texas Non-Profit
Corpora t ion; BARRY HACKNEY

Plaintiffs -Appellants

v.

CITY OF HOUSTON, TEXAS;
ACCESS HOUSTON CABLE
CORPORATION

Defendants -Appellees

Appeal from the United States District Court for the
Southern District of Texas, Houston.

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: April 8, 2004

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT HORTON, BARRY HACKNEY,
and NATIONALIST TELEVISION,
a subsidiary of THE NATIONALIST
MOVEMENT, a Texas
Nonprofit Corporation,

Plaintiffs,

V.

CITY OF HOUSTON, TEXAS,
a Texas municipal corporation,
and ACCESS HOUSTON
CABLE CORPORATION, a
Texas corporation,

Defendants.

CIVIL ACTION NO. H-92-3451

FINDINGS OF FACT & CONCLUSIONS OF LAW

Pending before the Court are Plaintiffs' (collectively "N-TV") claims against the defendant Access Houston Cable Corporation ("Access Houston"). The claims were

tried to this Court on August 31, 2001, and the Court makes findings of fact and conclusions of law as set out below.[1] After considering the testimony and exhibits in evidence, the parties' arguments, and the applicable law, the Court finds that judgment should be granted in favor of Access Houston.

Procedural Background

This case is currently on remand from the United States Court of Appeals for the Fifth Circuit. *See Horton v. City of Houston*, 179 F .3d 188 (5th Cir. 1999). The Fifth Circuit reversed the order granting summary judgment in favor of Access on Plaintiffs' challenge to the constitutionality of Access's higher fee requirements for programming that is not "locally produced" in and around Houston, Texas. *Id.* at 189. The Fifth Circuit agreed that the regulation at issue was content-neutral and that Access had identified substantial government interests that the regulation could advance. *Id.* at 193-96. However, it held that Access had failed to provide evidence that demonstrated, as a matter of law, that the regulation was narrowly tailored to advance its articulated substantial interests. *Id.* at 195-96. In particular, the court stated that:

> [Access] has not shown that, absent the fee charged to providers of non-local programs, its

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[1] To the extent that any conclusion of law is more properly characterized as a finding of fact, and vice versa, the Court adopts it as such.

> interest in promoting localism "would be achieved less effectively." [*United States v. Albertini*, 472 U.S. 675, 689 (1985).] Access has not provided any evidence linking the amount charged to non-local producers and the promotion of localism. More precisely, Access has not shown the amount of revenue generated from the fee, the number of providers who have been charged the fee, or whether the fees have actually helped purchase equipment, train producers, enhance community self-expression, or offset amounts underwritten by Houston cable subscribers. Access acknowledged there is no scarcity of time available for programs, so the fee plays no role in rationing airtime favorably to locally produced programs.

Id. at 195. Consequently, the Fifth Circuit remanded to this Court for further factual development, stating that:

> On remand, Access should prove how much revenue accrues from the fee for non-locally-produced programs, as well as the purposes for which it uses the revenue. If the revenue is minimal-that is, if it fails to ration scarce airtime, to reimburse Access's costs of airing non-locally-produced programs, or to make any realistic dent in the costs borne by cable subscribers for the production facilities-then the district court may conclude that the fee suppresses protected speech without providing any asserted benefits.

Id. at 196.

Appendix 8

On remand, Access and Plaintiffs conducted additional discovery and submitted motions for summary judgment. In the order addressing the motions, the Court noted that "the only remaining issue in this case ... is whether the increased payments that Access charged non-locally-produced programs are a narrowly tailored means to advance the substantial government interests that Access has articulated." Memorandum & Order, Dkt. # 107, at 5 (citing *Horton*, 179 F .3d at 195-96). As neither Plaintiffs nor Access had submitted evidence sufficient to demonstrate an entitlement to summary judgment, the Court denied both motions. *Id.* at 10. The Court then held a bench trial on August 31, 2001, where the parties were permitted to present evidence and argue their positions before the Court. The Court also permitted the parties to submit post-trial memoranda regarding the legal issues in the case.

Mootness

Before addressing the merits of this action, the Court will examine Access's contentions that this action is now moot and therefore not justiciable. Access testified that it no longer charges the ... fees in question and Plaintiffs have not disputed this claim.[2] Access contends that Plaintiffs' challenge is to the constitutionality of the fees

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[2] During the bench trial, Plaintiffs did imply that Access now charges different fees which may be unlawful, but there is no evidence before the Court to indicate that the new fees are merely a substitution for the old, challenged fees.

charged in the early 1990's as those fees were applied to Plaintiffs. Since Access no longer charges those fees, there is no longer any danger of Plaintiffs suffering any constitutional deprivations and consequently no need for the Court to protect the .Plaintiffs from anything. Therefore, Access argues that Plaintiffs' claims for declaratory and injunctive relief are moot.[3]

A case becomes moot upon the cessation of the unlawful conduct if(l) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 413-14 (5th Cir. 1999). However, it is well settled that a defendant's voluntary cessation of a

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[3] If Plaintiffs were seeking monetary damages for the past alleged deprivation, then cessation of the allegedly unlawful activity would not render the case moot. *See Harris v. City of Houston*, 151 F.3d 186, 191 fn. 5 (5th Cir. 1999) (stating that a claim for monetary relief in addition to the claims for injunctive and declaratory relief would have prevented the case from becoming moot). Plaintiffs did mention compensatory and punitive damages in their original complaint, but have not pursued these remedies. Rather, Plaintiffs' counsel only mentioned injunctive and declaratory relief at the bench trial and in post-trial briefing which supports a finding that Plaintiffs have waived any monetary claims against Access that had been listed in their complaint.

challenged practice does not render a case moot and deprive a federal court of its power to determine the legality of the practice unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598,609 (2001) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 189 (2000)). The Supreme Court has described this standard as "stringent," see *FOE*, 528 U.S. at 189, and has held that a finding of mootness is justified "only if it [is] absolutely clear that the litigant no longer [has] any need of the judicial protection that it [seeks]," *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). The "heavy burden" of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. *See FOE*, 528 U.S. at 189; *accord Adarand Constructors, Inc.*, 528 U.S. at 222.

Despite the heaviness of a defendant's burden, the test is not whether the action originally giving rise to the controversy could not *conceivably* reoccur, but whether it is absolutely clear that the behavior could not *reasonably* be expected to recur. *See City of Erie v. Pap's A.M.*, 529 U.S. m, 303 (2000) (Scalia, J., concurring). Access could conceivably reinstate the allegedly unlawful fees. However, the inquiry is whether it is absolutely clear that Access could not reasonably be expected to reinstate the fees.

Access presented witnesses at the bench trial who testified both that Access no longer charges the fees in question and that Access has no intention to ever charge such fees

again. Access also affirmatively states in its post-trial briefing that it has no intention to ever charge such fees again which it claims judicially estops it from ever attempting to reinstate the fees in question. Furthermore, Patricia Garlinghouse testified at trial that she suggested eliminating the nonlocal fees when she became executive director in 1997.[4] At the time of the suggested change, it does not appear that Ms. Garlinghouse was aware of the current litigation regarding the fees which had been in progress for approximately 5 years. Thus, the evidence before the Court indicates that Access did not alter its conduct in response to the litigation or as part of any litigation strategy, which is one concern that has been expressed by the Supreme Court when determining whether voluntary cessation of an activity renders a case moot. *See City of Erie*, 529 U.S. at 288 ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here."). Finally, Plaintiffs have not provided any evidence which contradicts Access's claim that it will never reinstate the fees in question. However, it is Access that "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *FOE*, 528 U.S. at 190.

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[4] The fees were not actually eliminated until some time in 1998. Defendant's Exhibit 28 submitted at the bench trial shows receipts for non-local broadcast fees that were collected as late as March 11, 1998.

While it is a close call, the Court does not believe that Access has met its heavy burden in this case. Unlike the cases where an outside force is acting to prevent reoccurrence of the challenged activity, *see, e.g., AT&T Communs. v. City of Austin*, 235 F.3d 241, 243 (5th Cir. 2000) (finding case moot where intervening state law prohibited challenged municipal conduct), the only obstacles to reinstatement of the challenged fees are Access's stated belief that it is judicially estopped from such reinstatement and Access's likely fear of repeated litigation. If Access chose to challenge its own judicial estoppel arguments and risk further litigation, its board could reinstate the fees at anytime. It may be unlikely that Access will ever reinstate the non-local fees, but that is not quite the same as finding that it would be unreasonable to expect that Access would reinstate them at some point. The evidence before the Court is not sufficient to show that it is absolutely clear that Access could not reasonably be expected to reinstate the fees at some point in the future. Therefore, Access's voluntary cessation of the allegedly unlawful activity is not enough to render this case moot.

Findings of Fact[5]

1. Access Houston is a non-profit Texas corporation with 501(c)(3) status.

2. In one of its initial information booklets, Access stated that "the purpose of [Access Houston's] public ac-

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[5] The Court's findings of fact are based on evidence and testimony presented at the August 31, 2001 bench trial.

cess television channel is to ensure that all residents of Houston can use access resources and facilities on an equitable basis. We are here to maintain and protect your first amendment rights for the freedom of speech and to assist the citizens of Houston in the production and distribution of access programming in a timely manner."

3. Access Houston began operating in 1987.

4. Access began charging user fees in 1988. One of these fees was a distribution fee. As used in the fee schedule, distribution refers to "the distribution of non-commercial public access programs." Distributing a program is commonly known as "airing" a program.

5. In addition to distribution fees, Access also charged all producers[6] fees to use Access's equipment and facilities during this same time period. For example, Access charged $150 for someone to attend a teleproduction workshop, $100/day to rent a camcorder kit, and $125/hour to rent an online edit suite.

6. The program distribution fee charged in 1988 was $75 for non-locally produced programs submitted by individuals and $100 for non-locally produced programs submitted by organizations. There was no charge for distribu-

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[6] While technically Access charged both local and non-local producers the same fees for renting equipment and studio space, if a producer had used the production equipment and facilities that were located in Houston for at least 50% of their work, it would make the production a locally produced program regardless of where the actual producer resided. Thus, by nature of using the equipment, almost every user becomes a local producer.

tion of locally-produced programs.

7. The program distribution fee amounts remained the same from 1988 until at least 1993. 8. Access charged distribution fees for non-locally produced programs from 1988 until at least March 11, 1998.

9. Access no longer charges anyone a fee for distributing a program, even if it is produced outside of Houston.

10. In 1989, Access distributed approximately 42.5 hours of non-locally produced public access programming.

11. In 1989, under Access's fee schedule, the 42.5 hours of non-local programming would have generated between $3,187.50 and $4,250.00 in revenue depending on how many programs qualified for either the individual or organizational rate ($75/hr for individuals, $100/hr for organizations).[7]

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[7] The Court can not tell from the documents submitted as evidence in this matter which non-locally produced programs were submitted by individuals, and which of these programs were submitted by organizations. Individual names appear next to many of the entries, but the individual could be a sponsor or contact person for an organization, or an individual submitting their own production. Despite Access's counsel's assurances at the bench trial that the documents would speak for themselves, there are no demarcations in the documents from the relevant time period to indicate which programs would have been subject to the individual rate, and which ones would have been subject to the organizational rate. Accordingly, for the relevant years, the Court has calculated the minimum and maximum amounts that could have been charged if all the pro-

12. In 1990, Access distributed approximately 54.5 hours of non-locally produced public access programming.

13. In 1990, under Access's fee schedule, the 54.5 hours of non-local programming would have generated between $4,087.50 and $5,450.00 in revenue.

14. In 1991, Access distributed approximately 67 hours of non-locally produced public access programming.

15. In 1991, under Access's fee schedule, the 67 hours of non-local programming would have generated between $5,025.00 and $6,700.00 in revenue.

16. In 1992, Access distributed approximately 59.5 hours of non-locally produced public access programming.

17. In 1992, under Access's fee schedule, the 59.5 hours of non-local programming would have generated between $4,462.50 and $5,950.00 in revenue.

18. From January 1, 1993 until March 15, 1993, Access distributed approximately 7 hours of non-locally produced public access programming. Def.'s Ex. 27.

19. From January 1, 1993 until March 15, 1993, under Access's fee schedule, the 7 hours of non-local programming would have generated between $525 and $700 in revenue.

20. Access did collect at least some of the fees it charged for distributing non-locally produced programs.

21. Access did not collect all of the non-local distribution fees that it charged. In particular, Access never collected any fees from N-TV for the times Access aired

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grams were either all subject to the lower, individual rate, or all subject to the higher, organizational rate.

N-TV's non- locally produced program "Airlink." There is no evidence before the Court that Access waived or otherwise did not actually collect the distribution fees it charged for any other non-locally produced programs during the relevant years.

22. Non-local distribution fees were included in the category of "user fees" on some financial statements, such as the Income Statements for the years ending June 30, 1991 and 1992. The non-local distribution fees were listed as separate "distribution" income or "distribution fees" in other financial statements, such as the budget sheets and the profit & loss statements.

23. Access's budget for fiscal year 1990-91, under the category of "Charges for Services," forecast income of $500/month from "Distribution" for a total projected income of $6,000 from distribution fees in FY90-91.

24. Access's fiscal year 1990-91 budget sheet lists the following sources of income under the category of "Charges for Services": distribution, duplication, workshops, friends of AHCC, special events, and underwriting.

25. Access's budget for fiscal year 1991-92, under the category of "Fees for Services," forecast income of$500/month from "Distribution" for a total projected income of $6,000 from distribution fees in FY91-92.

26. Access's fiscal year 1991-92 budget sheet lists the following sources of income under the category of ' 'Fees for Services": distribution, duplication, workshops, equipment, talk shows, and underwriting. The categories of "equipment" and "talk shows" have replaced the FY90-91 categories of ' 'friends of AHCC" and "special events."

27. Access's budget for fiscal year 1992-93, under the category of "Fees for Services," forecast income of

$637/month from "Distribution" for a total projected income of $7,644 from distribution fees in FY92-93.

28. Access's fiscal year 1992-93 budget sheet lists the following sources of income under the category of "Fees for Services": distribution, duplication, workshops, equipment, talk shows, and underwriting. These are the same categories as those listed in the FY91-92 budget.

29. Revenues generated from user fees, whether non-local distribution fees or video equipment rental fees, went into an unrestricted, general fund.

30. In fiscal year 1991-92, Access's total income from collected user fees was $48,464.[8]

31. In fiscal year 1992-93, Access's total income from collected user fees was $40,552.

32. In fiscal year 1993-94, Access's total income from collected user fees was $46,199.

33. Access collected $862.50 from distribution fees for the month of July 1993.

34. From July 1,1997 until March 11, 1998, Access collected $6,870 from non-local broadcast fees.

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[8] There is no evidence directly indicating what portion of the "user fees" collected by Access were distribution fees for non-locally produced programs. However, the distribution fees did comprise some portion of the user fees. The number of hours that non-locally produced programs aired in conjunction with the budget forecasts for income from the distribution fees provide indirect evidence of what portion of the user fees was derived from distribution fees.

35. In fiscal year 1991-92, Access generated $563,022 in revenues and had $621,734 in expenses. This resulted in a net loss of$58,712 for 1991.

36. In fiscal year 1992-93, Access generated $658,516 in revenues and had $634,586 in expenses. This resulted in a net profit of $23,930 for 1992.

37. In fiscal year 1993-94, Access generated $594,818 and expenses of$636,691. This resulted in a total loss of$41,873 for 1993.

38. Access received a portion of its funding from fees paid by Houston cable subscribers to the cable company, which would in turn pay franchise fees to the City of Houston. The City of Houston then provided money to Access from the franchise fees.

39. In February 1987, Access was expecting a 1989 budget shortfall of $350,000 if no additional revenue sources were found.

40. Access's Executive Director told the board of directors in April 1987 that the City of Houston funding would be inadequate to sustain Access's operations, even for the next few years.

41. Access's Executive Director reported to the board of directors in August 1987 that Access only had enough funds for another 3 to 4 months.

42. Access's board of directors discussed user fee issues at its April 1988 meeting, and the tension between charging enough to generate sufficient revenue to ensure Access's survival while still making sufficient equipment and facilities available to the residents of Houston free of charge.

43. As of November 1989, Access was 11% below the forecasted revenues for the year, but staff reduction had

reduced expenses.

44. In February 1990, Access's revenues were still below the revenues forecast in the budget, but Access's Executive Director felt that the recently received $14,000 grant from a medical center would help to ease the situation.

45. In April 1990, Access's revenues were still below the revenues forecast in the budget.

46. Access's fiscal year 1990-91 budget anticipated a loss of approximately $104,000 for the year.

47. In June 1990, the ED suggested serious budget cuts to be able to afford an additional salaried fund raising position in an attempt to solve the revenue problems being faced by Access. By way of example, the suggested cuts included cutting the postage budget from $8,400 to $4,400, cutting the printing budget from $7,404 to $4,404, cutting the promotion budget from $27,852 to $852, cutting the travel and training budget from $7,600 to $3,600, and cutting the education and training budget from $4,081 to $2,081.

48. In August 1990, Access's equipment maintenance costs, as well as demand for equipment and facilities, were increasing.

49. In December 1990, there were 300 to 400 active public access programming producers utilizing Access Houston.

50. In December 1990, Access Houston had reached its maximum capability to serve the public, based on available equipment and staff.

51. Increased public use of Access facilities in 1990 led to an increase in repair costs for equipment for the next year.

52. Access's fiscal year 1991-92 budget anticipated a loss of approximately $107,000 for the year.

53. Access's board was and is still concerned about a "snowball effect" if they fail to provide a certain level of services. If Access fails to offer a services of a certain quality level, then no one will want to use the services and fewer users leads to even lower quality levels in the future.

54. In May 1991, Access's Executive Director approached the board about budgeting in $5,000 for upgrades to the computer system and $50,000 for new production equipment to help keep Access current.

55. Access's board of directors regarded a $5,000 expenditure as a significant expenditure for Access Houston.

56. In May 1991, the board of Access Houston discussed eliminating a survey which cost Access $6,000 to reduce expenses. The board decided to continue to utilize the survey despite the expense because they considered it "crucial."

57. Access's fiscal year 1992-93 budget anticipated a loss of approximately $62,000 for the year.

58. Auditors expressed "substantial doubt" about Access's ability to continue as a going concern in September 1993.

59. Access had cash flow problems during the early 1990's. When the City did not pay Access on time, underwriting and user fees were the two primary sources of revenue available to Access.

60. Underwriting funds were difficult for Access to obtain, at least in part because corporations were unwilling to associate themselves with some of the programming aired on Access.

61. Access's board felt that user fees were useful dur-

ing times of cash flow problems, and that the cash generated by user fees was often "critically important" to Access in the late 80's and early 90's, especially with regard to equipment costs.

62. Currently, Access considers $30,000 in either income or expenses to be significant to its operation.

63. In December 1990, Access's Executive Director reported to the board of directors that the average public access program "cost" $294.[9]

64. Access never turned down a producer seeking to air a program during the relevant time period due to scarcity of air space.

65. At the time of the bench trial, Access had a budget of approximately $900,000, with $700,000 of that being supplied by the City of Houston.

Conclusions of Law

The Fifth Circuit has issued instructions on the standards that govern the Court's current inquiry:

> "Even a content-neutral regulation of speech on a public forum must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication." [*Hays County Guardian v. Supple*, 969 F.2d 111,118 (5th Cir. 1992).] The burden is on Access to show that the fee requirement is narrowly tai-

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[9] It is not clear whether the Executive Director was referring to the cost to a producer, or to Access.

> lored to protect the identified interests. *See id.* at 119. A regulation is narrowly tailored "when it does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" [*Id.* at 118 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989))]. In other words, Access must show that the fee requirement promotes a substantial governmental interest that would be achieved less effectively absent the regulation. [*See United States v. Albertini*, 472 U.S. 675,689 (1985); *Chicago Cable Communications v. Chicago Cable Comm 'n*, 879 F.2d 1540, 1550 (7th Cir. 1989)].

Horton, 179 F .3d at 194. As the Fifth Circuit has already found that the promotion of , 'localism" in the context of this case is an important government interest, *see id.* at 295, Access's only burden is to show that the fee requirement was "narrowly tailored" to protect the interests of localism. Access can meet this burden if it demonstrates that the fee rule does not burden substantially more speech than is necessary to further Access's legitimate interest in promoting localism, *see id.* at 194; *Turner Broad. Sys. v. FCC,* 520 U.S. 180, 213-14 (1997), or if it demonstrates that localism would have been promoted less effectively absent the fee requirement, *see Horton*, 179 F.3d at 194; *Turner Broad. Sys*, 520 U.S. at 214.

The Fifth Circuit and Plaintiffs both agree with Access that promoting localism is an important and/or beneficial interest for Access to pursue. Since its inception, Access has had difficulty generating sufficient revenue to pursue

this important interest. More specifically, Access has had difficulty generating sufficient revenue to keep its doors open to pursue any goal. At a minimum, Access has to remain open in order to allow anyone, local or non-local, to air a program on a Houston public access channel. As explained by Access's Executive Director Patricia Garlinghouse at the bench trial, Access also needs to maintain a certain level of quality in the facilities and services it offers the public in order to remain a viable, operating entity.[10] Thus, in order to remain open, Access needs to be able to fund not only the bare minimum of necessities, but also to fund the salaries of knowledgeable staff and to fund current equipment updates and purchases. From its start in 1987 through the relevant years in the early 1990's, Access's financial decisions reflect its attempts to offer the best services it could on a very limited budget. Access often exceeded its annual budget during this time period and was depleting its existing bank funds in order to offer the minimal quality level it felt the public required.

During these initial years, Access's main source of revenue was grant money from the City of Houston. The grant money came from franchise fees paid by the local cable

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[10] This is the snowball effect mentioned above. If Access fails to provide an acceptable level of quality, then fewer people will use the services and Access will suffer even greater income losses in the future, which in turn leads to lower quality, which leads to even fewer users, etc. This continues until Access is forced to shut down for lack of funding and/or failure to serve its mission.

company to the City of Houston. Houston cable subscribers paid fees to the cable company that funded the franchise fee payments. Therefore, Access derived the bulk of its revenues from money paid by Houston residents.

Access also derived revenue from some corporate underwriting, but had difficulty obtaining any significant corporate funding. Access's other primary source of revenue during this time period was the revenue derived from user fees, including distribution fees for airing non-locally produced programming. Access was often working on a tight margin and all of the sources of revenue were considered important for keeping Access's doors open.

Faced with such narrow margins and the reality of depleting its only savings fund, the revenue generated by the non-locally produced program distribution fees did aid Access in staying open and providing decent services and facilities to the public. Access received anywhere from about $4000 to $7000 in revenues from these non-local fees. During this same time period, a member of Access's board testified that $5000 was considered a "significant" expenditure. His testimony was corroborated by minutes from a 1991 board meeting which indicated that the board debated whether or not to continue to pay for a $6,000 survey that it considered crucial, because $6,000 was an expense that was significant enough that it needed to be debated by the board of directors. Under such economic conditions, revenue in the $4000 - $7000 range would be significant to Access.

The nature of public access programming is such that

the only "cost" for airing any particular program is the portion of overhead that can be attributed to any given program. Houston did not have a problem with sufficient public access channel air time during the years in question. Rather, witnesses for both sides testified that no producer was ever denied air time due to a scarcity of air time. Given an adequate supply of air time, it is tempting to conclude that it "cost" Access nothing to air any given program. If Access had sufficient revenues to pay its overhead, keep its equipment updated, and staff paid, this would be true. However, the reality was that Access lacked sufficient revenues to pay its entire staff or to keep its equipment as current as the public demanded. Therefore, while an additional program did not add to Access's expenses, a portion of Access's general expenses had to be attributed to each program aired until Access reached the magical point where its general expenses had been met. The airtime scarcity faced by Access in this situation was not the scarcity of a particular time slot, but the potential scarcity of any airtime for anyone if Access went under for lack of funding. Instead of focusing on the scarcity of airtime, or lack thereof, the appropriate focus is on the scarcity of resources that go into putting any given program on the air. This often included transferring a program to the proper format, which meant equipment use, but always included staff to place the program on the air. Thus, Access's scarcity of staff resources meant that the available staff time to assist in airing programs was rationed.

Not only did the revenues generated by the distribution fees help to prevent an overall scarcity of air time and ease the scarcity of staff time, but they did help "reimburse Ac-

cess's costs of airing non-locally-produced programs." *Horton*, 179 F 3d at 196. As stated above, the only way to assess Access's costs for airing any program is to attribute a proportionate amount of Access's overall costs to each program aired. Houston residents already contributed to paying Access's overall costs with their cable subscription fees. Furthermore, local producers also helped to contribute income to Access in the form of user fees paid to use the equipment and to take Access's workshops. The only contribution made by non-local producers was the distribution fee.[11] Without the fee, they would have contributed nothing to off-setting Access's costs in keeping its doors and air open. Admittedly, a Houston resident who did not subscribe to cable and did not use Access's facilities or services, could air a tape without contributing any income to help reimburse Access's costs in airing his or her program. However, in order to be narrowly tailored, a fee does not have to an exact fit as long the fee's burden is not substantially broader than necessary to achieve the goal of promoting localism. *See Ward v. Rock against Racism*, 491 U.S. 781,798 (1989). Even though some Houston users may benefit from Access without contributing anything does not mean the distribution fee is too heavy a burden to

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[11] While non-local producers were welcome to come to Houston and use Access's equipment, as discussed above, such a move would often convert the producer from a non-local producer into a local producer. Once the program was produced locally, the producer's program would not be subject to the non-locally produced program distribution fees.

impose on non-local producers in an attempt to have them contribute something to the service they are utilizing. The only burden the distribution fees place on the expression of speech is a minimal fee that is directly related to the amount of airtime the producer receives. It is not an arbitrary fee, but is directly correlated to the benefits a producer derives from Access. To place this minimal fee burden on a category of persons that otherwise does not contribute in any fashion to the costs of keeping public access airtime available is a reasonable way to help reimburse Access's general costs of keeping the facilities and channels open to the public. Thus, it appears that the fees paid by non-local producers to distribute their programs to the Houston airways not only helped to off-set Access's costs attributable to airing them, but did so without placing an arbitrary burden on the non-local producer.

The Fifth Circuit also suggested that Access could meet its burden of showing that the fee was narrowly tailored by showing that the revenue from the distribution fees made "any realistic dent in the costs borne by cable subscribers for the production facilities." *Horton*, 179 F .3d at 196. The parties spent much time at the bench trial discussing whether the fees made such a "realistic dent." Initially, the Court is perplexed by how to treat this instruction. In order to find that the revenues made a "realistic dent" in Access's costs, it would be necessary for Access to show that it received more than a minimal amount of revenue from the fees. In order to receive such a significant amount, Access would either have to have encouraged many non-local producers to air their programs on Access, and thus pay the fee, or Access would have had to charge more per hour for

a non-local producer to air a program. The first option interferes with Access's stated goal of providing a forum for the residents of Houston to voice their opinions by encouraging the voice of non-Houstonians to fill Access's airtime. The second option places an even greater burden on free speech by forcing producers to pay more per hour of airtime. If Access had charged $1000 per hour instead of $100, the revenues would have been greater for the programs that actually aired, but the higher cost may have deterred some non-local producers from paying to air their programs. While Access may not have been seeking to promote the voices of non-local producers, neither did it wish to chill their messages. Rather, Access simply sought to have a category of users, that otherwise did not contribute anything to offset Access's costs in providing airtime, contribute to Access's scanty income so that Access could provide services for future producers and promote localism by providing a forum for the residents of Houston to voice their viewpoints.

Recognizing that the First Amendment would not be served by having Access charge non-local producers more, the Court assumes that the Fifth Circuit was not actually looking for Access to show that the fee revenues made a dent in the Access's total annual costs of running the production facilities, but just that Access was receiving some benefit that justified the burden of imposing the fees. Showing that Access was receiving enough of a benefit to qualify as a "realistic dent" would support a finding of a reasonable fit between the goal, paying the overwhelming costs of keeping Access open to give Houston residents a forum to voice their local concerns and opinions, and the

regulation, a $75 or $100 charge for airing non-locally produced programs. In other words, the "realistic dent" is a way for Access to show that it did not burden substantially more speech than was necessary to achieve its goal. *See Turner Broad. Sys.*, 520 U.S. at 213-14.

Access has met its burden of showing that the fees did not burden substantially more speech than was necessary to help promote localism. As discussed above, Access needed revenue to achieve its goals of staying open to promote localism. Access chose to charge local producers user fees, and to charge the only class of persons that was not otherwise conceivably contributing any revenue, non-local producers, a distribution fee. This is burden on the speech of the non-local producers. However, Access was so desperately in need of funds that it needed to burden them to a certain degree to achieve its goal. Access chose an amount that was consistent with the amounts it charged non-local producers to use its equipment and facilities. The amount was large enough to generate some much needed revenue. The revenue went into a general fund that paid for such things as staff salaries and the "crucial" $6,000 survey the board wanted in 1991. However, the amount of the fee was also small enough that most organizations and individuals should be able to afford it, which minimizes the amount of speech ultimately restricted by the existence of the fee. If Access had charged less, the benefits Access derived from the amount may not have been worth the

slight burden the fee placed on non-local producers.[12]

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[12] Access may have still been able to derive a benefit if it had only charged individuals and organizations $50/hour and $75/hour respectively, rather than $75/hour and $100/hour. However, as the Fifth Circuit has already found that Access's fee was a content-neutral restriction, Access does not need to show that its fee system was the least restrictive means available to achieve its goal of promoting localism. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 301-02 (2000) (finding that a regulation need not be the least restrictive alternative to be considered narrowly tailored); *Turner Broad. Sys.*, 520 U.S. at 217-18 (same); *Ward v. Rock against Racism*, 491 U.S. 781, 798 (1989) (same). It is "well established" that when the test is whether a regulation is "narrowly tailored," "a regulation's validity does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Turner Broad. Sys.*, 520 U.S. at 218. Thus, even if slightly lower fees would have generated benefits for Access while imposing less of a burden on speech, it is not the Court's place to make such judgments. As long as the fees actually charged did not burden substantially more speech than necessary, they do not violate the First Amendment even if they were either a little higher or lower than necessary. *See Ward v. Rock against Racism*, 491 U.S. at 800 ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately

However, given the amount actually charged by Access, the burden on the speech of non-local producers was still minimal, but Access derived a notable benefit. The significance of this benefit is sufficient to show that the revenue generated made a "realistic dent," especially when considered in relation to the moderate burden being imposed.

In addition to demonstrating that the fee rule does not burden substantially more speech than is necessary to further Access's legitimate interest in promoting localism in the ways discussed above, Access can show that the fee requirement was "narrowly tailored" if it demonstrates that localism would have been promoted less effectively absent the fee requirement. It does not appear from the evidence before the Court that Access would have had to stop operating in any given year if it had not charged the non-local distribution fees. However, it is not necessary for Access to show that without the revenue from non-local fees it would not have been able to function at all, only that it would have less effectively served its function of providing production facilities and services to the residents of Houston seeking to express their views. While Access would have found a way to continue to operate without the type of sums in question, it would have operated less effectively. Access was already operating on a very tight budget and it was only offering the bare minimum of the types and quality of services it felt the public required. Any extra revenue of the amounts generated by the fees helped to provide, for example, crucial surveys, or necessary com-

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served by some less-speech-restrictive alternative.").

puter upgrades, or to contribute to salaries for necessary employees. If these fees had not generated that revenue, one of those expenses, or some similar expense, would have been cut from the budget. Without the computer upgrade or the surveyor quality employees, Access would have been less effective at providing a forum for the residents of Houston to express their views and concerns. Thus, Access has met its burden of showing that its legitimate interest, promoting localism, would have been achieved less effectively absent the fee requirement.

Accordingly, Access has met its burden to show that the rule imposing distribution fees for non-locally produced programs was narrowly tailored to serve its legitimate interest in promoting localism.

Conclusion

For the reason given above, the Court will enter judgment in favor of Access in an order entered on even date herewith.

It is so ORDERED.

Signed this 31st day of March, 2003.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20031

ROBERT HORTON, NATIONALIST TELEVISION, a Texas Non-Profit Corporation; and BARRY HACKNEY,

Plaintiffs-Appellants,

versus

CITY OF HOUSTON, TEXAS and ACCESS HOUSTON CABLE CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

June 18, 1999

Before KING, Chief Judge, JOLLY, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

At issue in this appeal is whether Access Houston Ca-

ble Corporation ("Access"), a "PEG" cable channel,[1] can, consistent with the First Amendment, charge a fee to cable-cast programs not "locally produced" in and around Houston, Texas. We conclude that Access Houston's fee requirement is a content-neutral regulation which implements a significant governmental interest in promoting localism, but Access has not met its burden of proving that the fee is narrowly tailored to serve that interest. We therefore reverse the grant of summary judgment and remand for further proceedings.

BACKGROUND

The City of Houston granted a cable franchise to Warner Cable Communications ("Warner") that required Warner to designate at least four PEG channels for the city's benefit.[2] Houston then engaged Access to manage the channels, including a public access channel.[3] Access is not a typical cable channel: It does not operate for profit, it does not have an editorial board that selects programming for cable-cast, and it does not sell advertising space.

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[1] PEG channels are those reserved for public, educational or governmental use by the municipal franchise agreement with a cable operator. See 47 U.S.C. § 531 and 531(e).

[2] Under the franchise agreement, the City of Houston can require Warner to make available an additional four cable channels if certain conditions are met.

[3] That Access is a state actor is undisputed on appeal.

Instead, Access's programming space is open to any individual or organization who wishes to televise constitutionally protected speech. Access neither produces programs nor broadcasts commercial programs. To promote the original programming on which it relies, Access offers (for a nominal fee) video cameras and other production equipment, training workshops, studio space and other services.

Access touts that it will broadcast any non-commercial program as long as the program engages in constitutionally protected speech and complies with various rules designed to allocate air time among the programmers. Access employees do not pre-screen submitted programs to determine whether they comply with the non-commercial speech rule or the First Amendment; instead, Access requires program providers to accept liability for the content of their programs by signing a Program Contract before the program will be aired.[4]

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[4] Pursuant to Rule 2.A-5, all program providers who wish to schedule broadcast time with Access must first sign a Program Contract.

The Rule states that,

> 2.A-5 PROGRAM CONTRACT AND RESPONSIBILITY: Before access programs are scheduled for cable-cast, the access program provider must sign a Program Contract which holds the program provider liable for content of the program and pay all applicable fees. In signing the Program Contract,

At the time this dispute arose, Access sought to encourage programs "that reflect[] the activities, culture, concerns, and interests of the citizens of Houston and []promote a free exchange of ideas, information and understanding."[5] To fulfill its contractual obligation with the City, Access's Board of Directors adopted a rule, which has been in effect since 1988, providing for "locally produced" programs to be broadcast free of charge. To qualify as a "locally produced program," at least 50 percent of the program must have been shot within the Houston Standard Metropolitan Statistical Area. Programs that do not comply with the "locally produced" rule are assessed a fee: individuals who submit non-local programs must pay $75 for each hour of programming, while organizations are charged $100 per hour. Because Access does not prescreen submitted programs, it cannot initially determine whether a program complies with the rule. Access relies on each program provider voluntarily to disclose whether the submitted program was locally produced.

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the program provider agrees in writing that his or her program does not include any form of "constitutionally unprotected speech."

[5] Access Houston ByLaws Art. III (1986). After the events in this case, in its 1994 contract with the City of Houston, the requirement to support localism became more explicit: "a minimum of 51 percent of the total hours programmed on the Access channel shall be locally produced in the Houston metropolitan area."

In March 1992, Appellant Nationalist Television ("N-TV"), as agent for Houston resident appellant Robert Horton, submitted a 30-minute program for cable-cast entitled *Airlink*.[6] After a month had passed and the program had not been cable-cast, N-TV wrote to the Houston City Attorney's office demanding that Access immediately cable-cast *Airlink*. The City Attorney replied that Access operates independently of the City and that Houston cannot require Access to broadcast *Airlink*. In addition, N-TV was informed that, according to Access, N-TV had not complied with the procedural requirements necessary to broadcast *Airlink* and that N-TV should directly contact Access to complete the application process. Despite this notification and the receipt of a complete copy of the Access procedural rules, N-TV continued to complain to the Houston City Attorney's Office rather than to Access. Months later, N-TV turned to Access and learned that it, like all other program providers, must sign a Program Contract. Two months more passed, N-TV finally signed the requested Program Contract, and Access began cable-casting *Airlink*.

Airlink was produced at a studio in Mississippi and did not qualify as a "locally produced program." N-TV was

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[6] The content of *Airlink* is described as "pro-majority" in some portions of the record and "white supremacist" in other parts of the record.

thus required to pay the $100 cable-cast fee.[7] N-TV refused to pay, arguing that the fee violated the First Amendment, and filed the present lawsuit seeking a declaratory judgment, a temporary restraining order, and a permanent injunction. Ironically, Access began regularly cablecasting *Airlink* just after the suit was filed, from December 1992 through February 1993. When N-TV refused to pay fees for the three months of programming that had been aired, *Airlink* was canceled.

Immediately after appellants filed suit, the district court held a hearing to rule on appellants' request for a temporary restraining order ("TRO hearing"). The district court denied the request and offered to set the case for trial. Each party then moved for summary judgment. The court held in favor of Access and the city, ruling that the fee requirement is a facially valid, content-neutral regulation incidental to free speech under the test articulated in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968), and that the appellants failed to raise a genuine issue of material fact regarding whether the fee requirement was unconstitutional as applied.

STANDARD OF REVIEW

The standard of review of a summary judgment at the appellate level is *de novo*. Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and

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[7] Since *Airlink* was a half-hour program, the $100 fee was prorated, making N-TV liable for $50 per cable-cast.

admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24, 106 S. Ct. 2548 (1986). Under this standard, all fact questions must be viewed in the light most favorable to the non-moving party, and questions of law are reviewed *de novo*. *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995).

DISCUSSION

N-TV scatter-guns its First Amendment arguments against the Access fee for non-locally-produced programs. Attacking the fees both facially and as applied, N-TV asserts that the fee rule grants overbroad, arbitrary discretion to Access administrators, encouraging content-based discrimination against programs. More fundamentally, N-TV contends that the fee regulation is an impermissible content-based rule. N-TV also levels equal protection, overbreadth and vagueness challenges to the fees, but these arguments were not raised in the district court and will not be considered here.

Fitting the PEG channels into the familiar holes of First Amendment jurisprudence is not easy. The premise of our discussion is that programmers have some kind of First Amendment rights to share the podium at a PEG local access channel set aside by Houston's cable franchise contract. The Supreme Court has implied that all of the participants in cable television-programmers, cable operators, TV broadcasters, PEG channels -- enjoy free speech rights, but

the limits of those competing and potentially conflicting rights are far from clear. *See generally*, Pluralism on the Bench: Understanding *Denver Area Educational Telecommunications Consortium v. FCC*, 97 Colum. L. Rev. 1182 (1997).

The first conundrum relates to the dubious status of PEG channels, which municipalities have the authority to set aside in their cable franchise agreements with cable operators. *See* 47 U.S.C. § 531(a). In the "must-carry" case, the Supreme Court upheld a federal law requiring cable operators to make available transmission space for local TV broadcasters. *Turner Broadcasting System v. FCC*, 512 U.S. 622, 114 S. Ct. 2445 (1994). The Court concluded that the "must-carry" provisions are a content-neutral regulation designed, not to force a particular type of speech upon cable operators, but to further the non-speech-related goals of protecting local broadcasters and assuring free TV access to citizens who lack cable connections. The four dissenters in *Turner* essentially stated, however, that forced set-aside of PEG channels is a content-related imposition on cable operators, *Turner* 512 U.S. at 675, 114 S. Ct. at 2476 (O'Conner, J., concurring in part and dissenting in part), and the majority decision offers no rationale opposed to such a conclusion.[8]

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[8] Indeed, the majority emphasized that neither the must-carry rule nor laws and rules presently applicable to broadcasting (*e.g.* on non-commercial stations) directs the content of the programs. *Turner*, 512 U.S. at 649-651, 114 S. Ct. at 2462-63.

Justice Thomas reiterated the PEG constitutionality problem and scholarly discussions of it in the Court's most recent cable decision, only to note that the issue had not been raised. *See Denver Area Educ. Telecomm. Consortium v. FCC*, ___ U.S. ___, 116 S. Ct. 2374 (1996). The ultimate fate of PEGs, including Houston's local access channel, remains in doubt, but is not to be decided in this case.

The second conundrum arises from the implicit concession of Access that the local access channel represents a government-owned designated public forum. Nevertheless, the Supreme Court has cautioned that "the public forum doctrine should not be extended in a mechanical way to the very different context of public television-broadcasting." *Arkansas Educ. Television Comm. v. Forbes*, __ U.S. __, 118 S. Ct. 1633, at 1639 (1998). In a later cable regulation case, seven justices of the Court either rejected or declined to consider Justice Kennedy's assertion that a local access channel is a public forum available to citizens under the most exacting constitutional standards. *Compare Denver Area*, ___ U.S. at ___, 116 S. Ct. at 2404-05 (Kennedy, J., concurring in part and dissenting in part), *with id.* ___ U.S. at ___, 116 S. Ct. at 2388-89 (Breyer, J.) (refusing to consider public forum doctrine), *and id.* ___ U.S. at ____, 116 S. Ct. at 2426-28 (Thomas, J., concurring in the judgment in part and dissenting in part) (PEG channel is not a public forum). If one were either to press the analogy between Access and a classic public television station or to reject the public forum doctrine for local access channels, then

Access would enjoy virtually unfettered programming discretion. Access does not request such latitude, however, so the arguments that Access is not a public forum or is a limited public forum are not before us.

The consequence, for First Amendment purposes, of ascribing particular forum (or non-forum) characteristics to Access lies in the strictness of legal scrutiny that will be applied to Access's fee regulation. Access contends that the regulation is subject to "intermediate scrutiny" because it has nothing to do with the content of programmers' speech. *Turner*, 512 U.S. at 642, 114 S. Ct. at 2459. N-TV argues and Access concedes that were the regulation content-related, it would be subject to strict scrutiny. *Id.* And this dichotomy of regulations has been developed to govern what may be done to limit speech in either a traditional public forum or a designated public forum.[9] *See* 4 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 20.47 at 310-11 (2d Ed. 1992). Although it is impossible to state whether a local access channel should be analyzed by reference to the public forum doctrines, the dichotomy of standards seems to apply to broadcast regulations.

The nub of the parties' disagreement turns upon

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[9] If Access were, instead, a limited public forum or a nonpublic forum it would be permitted to place reasonable restrictions on the speech of programmers. *See Forbes*, ___ U.S. at ___, 118 S. Ct. at 1640-42. But it plainly does not fit in these categories.

whether the fee charged for non-locally produced programs is content-neutral, or, as N-TV would have it, a ruse for influencing the content of programs that will be cable-cast.

The Supreme Court has observed that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner*, 512 U.S. at 642, 114 S. Ct. at 2459. Regulations that "by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content based." *Id.* 512 U.S. at 643, 114 S. Ct. at 2459. Thus, a rule that is applied because of disagreement with a message presented or a rule that has a substantial risk of eliminating certain ideas or viewpoints from the public dialogue are content-based. *See id.* 512 U.S. at 642, 114 S. Ct. at 2459; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295, 104 S. Ct. 3065, 3070 (1984). If, on the other hand, the regulation is justified without reference to the content of the speech or serves purposes unrelated to the content, it is a content-neutral regulation, even if it has an incidental effect on some speakers or messages but not others. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989); *Boos v. Barry*, 485 U.S. 312, 320, 108 S. Ct. 1157, 1163 (1988). Finally, this court has noted that government regulations that apply even-handedly to all speakers weigh in favor of finding content-neutrality. *See International Soc'y for Krishna Consciousness of New Orleans, Inc. v. Baton Rouge*, 876 F.2d 494, 497 (5th Cir. 1989).

We conclude that Access's fee rule is content-neutral because the rule does not, by its terms, distinguish between

favored speech and disfavored speech. Access does not examine the content or message of submitted programs in determining whether to impose a fee. *Compare Frisby v. Schultz*, 487 U.S. at 474, 481-82, 108 S. Ct. 2495, at 2501 (1988) (finding that a municipal ordinance prohibiting all picketing near a residence was content-neutral because government did not have to look at the content to determine where picketers can demonstrate), *with Boos*, 485 U.S. 312, at 318-19, 108 S. Ct. 1157, at 1162 (1988) (finding that an ordinance prohibiting demonstrations in front of foreign embassies that are critical of the foreign government was content based because government necessarily had to review content to determine the legality of the demonstration). Access's fee regulation is an evenhanded charge on all providers submitting non-locally-produced programming, regardless of the content or viewpoint contained in the program. In addition, the fee rule can be justified without referring to the content of any of the submitted programs. *See Ward*, 491 U.S. at 791, 109 S. Ct. at 2754. As discussed *infra*, Access asserts that the fee rule promotes local ideas and debate and helps fund equipment and training for local producers and the cost of Access's operations. *See id.; Boos*, 485 U.S. at 320, 108 S. Ct. at 1163. Finally, we rely on a Seventh Circuit case that upheld as content-neutral, albeit before *Turner*, a Chicago rule requiring locally-produced programs. *Chicago Cable Comm. v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989).

To the extent that Access's fee rule unabashedly prefers locally-produced programs, we recognize that it is not unassailable. The dissenters in *Turner* criticized legislative

preferences for "diversity of viewpoints, for localism, for educational programming . . ." as content-based regulations. *Turner*, 512 U.S. at 675, 114 S. Ct. at 2476. They noted that no matter how praise-worthy the objectives, government may not favor one set of speakers over another. *See id.* 512 U.S. at 677-78, 114 S. Ct. at 2476-77. Only a four-member plurality in *Turner* directly responded to arguments concerning localism, but the majority opinions emphasized the purely economic reasons why Congress wanted to support local broadcasters by requiring "must-carry" by cable operators. The non-speech-related basis for the rule made it content-neutral. *See id.* 512 U.S. at 645, 114 S. Ct. at 2461.

In this case, one may argue that while the interest in "localism" is furthered by the fee rule, not only is there no direct content regulation, but the fee compensates the citizens of Houston in a small way for the costs incurred when non-locally-produced programs air on the Access channel. The fee subsidizes Access and substitutes for the local resources that could otherwise be utilized to produce programs. The fee thus has an independent economic basis more closely analogous to the content-neutral must-carry rule than to a purely content-related localism preference. We therefore conclude that the non-locally-produced fee rule is content-neutral.

The standard for evaluating the constitutionality of content-neutral regulations was articulated in *O'Brien*:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the

> Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377, 88 S. Ct. at 1679. As Access's fee regulation is on balance a content-neutral rule, the third prong of the *O'Brien* test has been satisfied, and, germane to the first prong, Houston has the power to sponsor a public access cable channel and raise revenues for its operation.

Still at issue are the second and fourth *O'Brien* standards. "Even a content-neutral regulation of speech on a public forum must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication." *Hays County Guardian v. Supple*, 969 F.2d 111, 118 (5th Cir. 1992). The burden is on Access to show that the fee requirement is narrowly tailored to protect the identified interests. See *id.* at 119. A regulation is narrowly tailored "when it does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 118 (quoting *Ward*, 491 U.S. at 799, 109 S. Ct. at 2758). In other words, Access must show that the fee requirement promotes a substantial governmental interest that would be achieved less effectively absent the regulation. *See United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 2906 (1985); *Chicago Cable*, 879 F.2d at 1550.

Access argues that the fee requirement promotes the substantial governmental interest in "localism." According to Access, the fee encourages residents to produce programs featuring topics of local concern which in turn enhances community self-expression and fosters direct communication among residents. Since a portion of the revenues derived from Houston residents' cable bills funds Access's operations, residents should not have to subsidize non-locally-produced programs.[10] Similarly, Access urges that the revenues generated from the fee train local producers, purchase production equipment, and fund the general operations of Access. Finally, encouraging residents to produce local programming increases job opportunities and

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[10] At the TRO hearing, the executive director for Access expanded on this theme, testifying that,

> the residents of the City of Houston, through their cable bills, underwrote the costs of the facilitation that our organization provides of putting the programs together, scheduling them and putting them on the cable system. We've never had a problem with where programs come from in terms of content. We frankly don't care about what the content is. What we were concerned about was it seemed unfair to us that the residents of City of Houston should subsidize programs that were from somewhere else and that, if someone wished to use the facilities, that they should contribute to sustaining the organization that had to help facilitate the users of all the programs on the channels.

career development of Houston residents. We agree -- and N-TV does not dispute[11] -- that the promotion of "localism" in this context is an important governmental interest. *See Chicago Cable*, 879 F.2d at 1549-50.

That Access's asserted interests are substantial in the abstract does not mean, however, that the fee regulation fulfills them and is narrowly tailored to protect those interests. The fee rule will be considered narrowly tailored if Access can demonstrate that it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799, 109 S. Ct. at 2758. According to Access's rules, "locally produced programs" are aired free of charge, while "programs produced elsewhere" are charged either $75 or $100 per hour. Access defines local programming as "[a]ny program submitted for cable-cast containing program material of which fifty (50) percent or greater was shot" within the Houston Standard Metropolitan Statistical Area.

Access has failed to demonstrate narrow tailoring of the fee rule as a matter of law. It has not shown that, absent the fee charged to providers of non-local programs, its interest in promoting localism "would be achieved less effectively." *Albertini*, 472 U.S. at 689, 105 S. Ct. at 2906. Access has not provided any evidence linking the amount charged to non-local producers and the promotion of local-

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[11] At oral argument, N-TV agreed that Houston has a substantial interest in promoting localism.

ism. More precisely, Access has not shown the amount of revenue generated from the fee, the number of providers who have been charged the fee, or whether the fees have actually helped purchase equipment, train producers, enhance community self-expression, or offset amounts underwritten by Houston cable subscribers. Access acknowledged there is no scarcity of time available for programs, so the fee plays no role in rationing airtime favorably to locally produced programs.

Access's general fee schedule demonstrates the lack of correlation between the amount charged to non-locally produced programs and its stated justification for imposing a fee. Access heavily subsidizes most of the services and equipment it offers to the public. Next to each item listed on the general fee schedule, Access lists the cost of the item, the amount subsidized by Access, and the resulting net cost to the producer.[12] Notably, however, the fees charged to program providers for cable-casting their programs are not itemized by actual cost, amount subsidized, and net cost to provider. The general fee schedule merely states that Access airs locally produced programs free of charge, while programs produced elsewhere are charged

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[12] For example, the actual cost of renting a "Video-Mobile Portable Kit" is $250; however, Access pays $190 of the cost via a grant, leaving the producer liable for only $60. *See Access Houston Cable Corporation's Objections to Proposed Order Granting Summary Judgment*, Exhibit D (fee schedule effective May 19, 1988).

either $75 or $100 per hour, depending on whether the provider is an individual or organization. Not only is there no evidence how much of the fee charged for non-locally-produced programs compensates Access for its cable-casting costs of those programs, but Access's executive director testified that he had recommended abolition of the fee to the Board of Directors. The inescapable conclusion is that the fee serves no measurable purpose.

Because Access has not met its summary judgment burden to sustain the fee, this case must be reversed and remanded. *See Turner,* 512 U.S. at 667-68, 114 S. Ct. at 2471-72 (reversed and remanded for further factual development). On remand, Access should prove how much revenue accrues from the fee for non-locally-produced programs, as well as the purposes for which it uses the revenue. If the revenue is minimal -- that is, if it fails to ration scare airtime, to reimburse Access's costs of airing non-locally-produced programs, or to make any realistic dent in the costs borne by cable subscribers for the production facilities -- then the district court may conclude that the fee suppresses protected speech without providing any asserted benefits.

Further judicial efforts would be avoided, however, if we accept N-TV's alternative argument that the fee rule confers excessive discretion upon Access's administrator and permits content-based discrimination. According to N-TV, Access's own interpretation of the fee rule undermines the argument that it is narrowly tailored. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 131, 112 S. Ct. 2395, 2402 (1992) (courts should consider the

government's interpretation of a challenged regulation when addressing facial challenges). In *Forsyth County*, the Supreme Court addressed whether a county could constitutionally charge a fee to speakers who wished to hold a rally in a traditional public forum. *See id.* 505 U.S. at 129, 112 S. Ct. at 2400. The Court struck down the ordinance because it vested too much discretion in the county administrator; the administrator could, without objective guidance, determine how much or whether to charge the demonstrators a permit fee of up to $1,000. *See id.* 505 U.S. at 132-33, 112 S. Ct. at 2402-03. In the present case, the Executive Director of Access felt that he could independently determine whether to charge a fee for certain non-locally-produced programs. During the TRO hearing, the following exchange occurred between Appellants' attorney and Access's Executive Director:

> Question: What about a guy that stopped by the other day and just happened to pick up some of your material and the receptionist was there and I said, "You know, what if somebody wanted to go up and get an interview in Dallas with Ross Perot, shoot it up there" and she said, "That will be all right?" Would that be okay with you?
>
> Answer: It would be okay with me.
>
> Question: No charge for that?
>
> Answer: No charge.

Question: Okay. Now, just assume for a moment that here is a tape and we're showing it and there is Senator Gramm. He's seated at a desk. There's books behind him. And he's sitting there talking about taxes. Everybody is concerned about them these days. Any problem putting that on?

Answer: No.

Question: Okay. Now, let's say that it's on the air and one of your staff comes in and says "Mr. Cantrell, you know, I've been in Senator Gramm's office in Washington and I recognize those books. That was filmed in his office in Washington." No real problem, though?

Answer: No real problem.

Other similar exchanges occurred during the TRO hearing, each one suggesting that Access's administrator could, at his discretion, make special exceptions to the fee rule depending upon the circumstances presented.[13] The discretion

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[13] For instance, in another exchange, Access's Executive Director testified as follows:

Counsel: Let's say that Mr. Horton comes into your studio and he produces a show right there in your studio every week,

afforded the Executive Director is highlighted by contrasting the hypothetical above with one presented to him later during the TRO hearing:

Question: [Suppose] [h]e's got a 30-minute show. He comes so close. for 14 minutes he shows

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free. He goes to Mississippi. He's over there visiting the headquarters [of N-TV] and everything and the poor fellow is in a car wreck and he broke his leg and he calls you up and says, "I can't get back to Houston. I'm going to have to shoot this from the hospital bed in Jackson" and he sends you the tape. Is he going to have to pay for that?

Answer: Under the Current rules, that would be the case.

Counsel: Would you waive that in this case?

Answer: Would I waive it?

Counsel: Yes

Answer: In the grievance procedure, I would recommend that we waive it. I would probably take it upon myself to waive it.

the Houston skyline. Would you let him slide on that without having to pay?

Answer: Like I say, we would -- that would be a good issue to discuss in the grievance procedure.

Question: You might let it slide?

Answer: Well, I don't think I would let it slide. But if it came up, I think it would be something worth discussing with the board.

Access's response to this troubling amount of apparently unguided discretion is that N-TV presented no actual evidence that the fee had been discriminatorily imposed. We agree that, in light of the express objectivity of the rule, a facial challenge based on standardless discretion lacks merit. The rule, unlike the sliding-scale fee in Forsyth, unequivocally identifies the programs to which it applies and simply does not justify the latitude which the Executive Director hypothesized. Further, lacking any proof that the fee was ever administered discriminatorily to suppress disfavored speech, N-TV's as-applied challenge must fail.

CONCLUSION

Much is uncertain about the scope of First Amendment benefits and burdens in the cable industry. The directions presently available to us from the Supreme Court appear to require a standard less than that of strict scrutiny for Ac-

cess's non-locally-produced fee rule, but they also require attention to the details of intermediate scrutiny. Regulations like this one which burden protected speech are not to be rubber-stamped. Based on the foregoing discussion, the case must be reversed and remanded for further factual development.

REVERSED and REMANDED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT HORTON, BARRY HACKNEY,
and NATIONALIST TELEVISION,
a subsidiary of THE NATIONALIST
MOVEMENT, a Texas
Nonprofit Corporation,

Plaintiffs,

V.

CITY OF HOUSTON, TEXAS,
a Texas municipal corporation,
and ACCESS HOUSTON
CABLE CORPORATION, a
Texas corporation,

Defendants.

CIVIL ACTION NO. H-92-3451

MEMORANDUM OPINION

In a previous order, the Court announced its intention to grant summary judgment in favor of Plaintiffs Robert Horton and Nationalist Television. (Docket entry #46). Defendants, the City of Houston and Access Houston Ca-

ble Corporation ("Access Houston"), have had the opportunity to respond. In this opinion, the Court first finds that the City of Houston is not legally responsible for Access Houston's decision to impose fees and, therefore, is not liable to Plaintiffs for any constitutional violation. Second, the Court concludes that it cannot grant summary judgment on either of the nonconstitutional grounds: (1) that the imposition of mandatory fees was an *ultra vires* act, or (2) that Access Houston violated the Cable Communications Policy Act. Third, the Court is of the opinion that the Plaintiffs' motion for summary judgment on First Amendment grounds should be DENIED because the fee rule is content neutral and survives a facial constitutional challenge under intermediate scrutiny.

Finally, as the Court finds that there are no genuine issues of material fact, the Court will GRANT Defendant Access Houston's motion for summary judgment.

1. Factual and Regulatory Background

Robert Horton is a Houston resident who seeks to cablecast a half-hour weekly program called *Airlink* over Houston cable television channels dedicated to "public, educational, and governmental programming." ("PEG channels").[1] Defendant Access Houston is a corporation char-

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[1] Barry Hackney was joined by Court order as an additional plaintiff on October 9, 1997. He, like Plaintiff Horton, is a member of the Nationalist Movement who seeks the cablecast of *Airlink*.

tered by Defendant City of Houston for the sole purpose of operating the PEG, or "public access' channels on all cable systems in Houston. *Airlink* is produced in Mississippi by Plaintiff Nationalist Television, a subsidiary of the Nationalist Movement.[2] The content of the *Airlink* show is described variously as "pro-majority" by Plaintiffs and "white supremacist" elsewhere in the record. *See, e.g.*, Dkt. #4, Ex. X. Plaintiffs allege that Defendants have violated their First Amendment right of free speech by charging them $100.00 per hour to cablecast programming produced outside the Houston Standard Metropolitan Statistical Area. ("SMSA"). Over the course of a calendar year, this mandatory fee would require Nationalist Television to pay roughly $2,600.00 to Access Houston to cablecast the weekly *Airlink* show.

City of Houston Ordinance 93-156, the current franchise agreement between the City of Houston and Warner Cable Communications,[3] describes in Exhibit B various policies and procedures related to public access programming on the Warner Cable system. One subsection of

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[2] Plaintiff Nationalist Television, a subsidiary of The Nationalist Movement, a Texas nonprofit corporation, was substituted by Court order on October 9, 1997 for the prior Nationalist Television entity (a subsidiary of The Nationalist Movement, a Mississippi nonprofit corporation).

[3] Warner Cable is one of several franchisees authorized by the City of Houston to cablecast programming to cable subscribers.

these Access Policies and Procedures specifies:

> G. Production of programming by organizations within the City of Houston will be encouraged. Programming by organizations within the City shall be given scheduling preference over programs produced outside the City.
>
> In recognition that the Public, Educational, and Government Access channels are primarily intended to benefit the Houston community by encouraging the production of programming that has local significance, the majority (51% of total hours available which shall be calculated by dividing the total number of hours of local programming on all Access Channels by the total number of hours of programming), excluding character generated programming, shall be produced by individuals, institutions or organizations from within the City of Houston. An exception may be made for Educational programming that meets community needs and that is not available from local producers if such programming is pre-approved and submitted by a local institution or organization. Such exceptions may not be made for more than 5% of total hours available as calculated above.

Similarly, the 1994 contract between the City of Houston and Access Houston contains the following requirements:

> 2.03. Local Programming. (a) By the end of the

> first Contract Year, and for all succeeding Contract Years, Access Houston shall cablecast a minimum of 18 hours per day , of eligible programming, excluding character-generated programming. By the end of the second Contract Year, and for all succeeding Contract Years, a minimum of 51 percent of the total hours programmed on the Access Channel shall be locally produced in the Houston metropolitan area.
>
> (b) Access Houston shall make available a minimum of 61 hours per week of community interest programming developed by community groups, organizations, and other local institutions.
> ...
>
> Policies and Procedures shall be established by Access Houston which at a minimum should include the following: ...
>
> 7. Production of programming by organizations within the City of Houston will be encouraged. Programming within the City shall be given scheduling preference over programs produced outside the City.

The Plaintiffs do not challenge Houston's strict PEG local content requirements in any manner. Nor do Plaintiffs appear to object in principle to the notion that Houston should have *some* policy to promote "localism," ensuring that a fair portion of PEG programming is produced locally and responsive to local interests. Rather, Plaintiffs' con-

cern is with Access Houston Cable Corporation's handling of the forty-nine percent (49%) of programming which, according to the Houston regulations, may be produced *either* in Houston or elsewhere.[4] Plaintiffs' concern is that while Access Houston will cablecast all locally produced programming without charge (so long as the programming satisfies certain technical requirements for compatibility with cable transmission systems, it is not obscene, libelous or otherwise illegal, and it meets certain other criteria spelled out in the Houston franchise agreements), all non-local programming, however, may be cablecast *if and only if* the individual or organization seeking to air the programming pays an hourly fee.

The fee for non-local programming is not the only fee that Access Houston charges. It is, however, the only mandatory fee. Access Houston charges fees for training classes, but these training fees and other fees are placed in a fund "to provide training to those unable to pay for it." *See* Dkt. #47, Ex. E, at I 10. In contrast, the rule concerning fees for non-local programming provides no procedure for individuals and organizations without substantial re-

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[4] In other words, the Houston rules establishing a minimum local content requirement only establish a "floor" for the amount of locally-produced programming that may be cablecast; the rules do not represent a "ceiling." That the Houston PEG regulations permit the cablecast of non-local programming at least some of the time indicates that "localism" is not the *exclusive* goal of the PEG channels in Houston.

sources to apply for a waiver. Access Houston also charges fees for the use of the resources it provides to individuals and organizations for the production of PEG programming (studio and editing facilities, video cameras, and the like); however, some of the time, these resources are reserved for use without charge on a first-come, first-served basis. The reason fees are imposed at other times, Access Houston explains in its regulations, is that demand for free access to production facilities far exceeds the supply. Therefore, the usage fees for production resources, which are still well below market rates for similar facilities and equipment, only ensure preferential access to these resources; the fees are *not* an absolute precondition to the use of Access Houston's production resources.

Neither the Houston cable franchise agreements, nor any contract between the City of Houston and Access Houston, nor the Access Houston bylaws or articles of incorporation requires Access Houston to impose mandatory fees on non-local programming. The mandatory fees are solely the product of a resolution by the Access Houston Board of Directors. The Access Houston Board of Directors claims, however, that the City of Houston has impliedly authorized Access to impose mandatory access fees on non-local programming. Such authorization must be implied because there appears to be no express authorization by the city to charge a "fee" of any nature.

Access Houston's Board of Directors believes that the power to impose such a fee, and to withhold airtime as a means of coercing payment, is implicit in its power to promulgate rules and regulations. The 1994 contract between

Access and the City provides:

> 2.04 Policies and procedures. In *connection with the performance of its obligations* hereunder, Access Houston shall establish, implement and enforce quality control and other procedures for programming consistent with the Policies and Procedures contained in **Exhibit A** hereto. Public Access Programming must be consistent with the goals, objectives, and the scope of services stated in this Contract throughout the Contract Term
> ...

(*italics* added). Exhibit A to the contract says nothing about user fees; concerning non-local programming, Exhibit A only specifies that local' programming shall be given preferential scheduling. Likewise, the Access Houston Bylaws specify in Article III:

> Access Houston is organized to coordinate, develop and administer all public access activities for access to those cable channels available to the City of Houston for access activities as a result of its cable franchise agreements and not reserved by the City of Houston for municipal access activities. Access Houston . . . shall act as public trustee in the administration of this public resource in the community interest. In order to accomplish this purpose, Access Houston shall:
> ...
>
> 5. Establish and administer, under the juris-

> diction of the Board of Directors of Access Houston, all rules, regulations, policies and operating procedures, including training requirements, pertaining to the use and scheduling of these cable access channels; . . .

The Bylaws also specify in Article V, Section 3 that the Board of Directors shall "[s]et policies for the operation of Access Houston and establish its general course from year to year in accordance with the purposes as outlined in Article III."

Also in Article III of Access Houston's Bylaws, Access Houston is authorized to "hire and supervise staff," "purchase materials and equipment, and supervise staff," "purchase materials and equipment," "establish, manage and operate cable access facilities, including a means of production and a means of delivery of programming to the cable system(s)," and to "provide ... the resources[5] to pro

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[5] The 1994 contract also requires "at a minimum," for the purpose of development and implementation of public participation, that Access Houston "[p]rovid[e] to local individuals, institutions and organizations, on a non-discriminatory basis, the necessary resources to produce public access programs. This includes facilities, materials, equipment and personnel." The power to condition cablecast of programming upon the payment of mandatory fees is no more implicit in the requirement to "provide resources" to the community for video production than it is

duce programming for the cable access channels to individuals, institutions, and organizations within the city of Houston on a non-discriminatory basis."

The Bylaws do not require that Access Houston limit itself to franchise fees as its sole funding source; rather, the Bylaws specify:

> In addition to the monies received by Access Houston from the City of Houston, the Board of Directors may seek and receive private, federal, state, county and other municipal funds for the purpose of developing and promoting cable television programming of a public and educational nature for the principal benefit of the citizens of Houston. The Board of Directors of Access Houston may also accept on behalf of Access Houston any contribution, gift bequest or other devise for general purpose(s) or for any special purpose(s) of Access Houston.

As the City points out in its briefing, the 1994 contract between the City and Access in section 2.01(v) requires Access to "[m]ake diligent efforts to secure outside funding, including soliciting contributions, to augment Public Access Payments, including without limitation solicitation of public membership subscriptions." The 1993 Warner Cable franchise agreement also specifies that Access

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implicit in the power to "purchase materials and equipment" or to 'hire and supervise staff."

Houston may use airtime for the purpose of conducting fundraising drives, presumably by soliciting PEG membership subscriptions from cable customers. While all of these documents expressly contemplate Access Houston conducting fundraising activities through the solicitation of voluntary contributions, none of them contain any authorization to condition cablecast of programming on the payment of mandatory user fees.

At the time this lawsuit commenced, the question concerning the propriety of the Access Houston fee for non-local programming was relatively easy to resolve. In 1979, Warner Cable entered into a franchise agreement with the City of Houston for a term of fifteen years; this agreement was adopted as a City of Houston ordinance. Hence, Access Houston was required to abide by the terms of the Warner Cable franchise agreement, if for no other reason than the requirement in section 4.1.6 of the 1986 contract between Access Houston and the City that "[Access Houston] shall comply with all laws, statutes, ordinances, decrees, requirements, orders, judgments, and regulations of governmental authorities, to the fullest extent possible where failure to do so might reasonably be expected to have an adverse material effect upon [Access Houston], its properties, or its business activities." With regard to PEG channels, the 1979 Warner Cable contract specified that "at least two channels shall be reserved for the use of the public, one of which shall have nondiscriminatory access without charge on a first come, fast serve[d] basis, and the other of which shall be reserved for use by the city."

Therefore, when the City of Houston for-med Access Houston in 1986, and passed Access Houston's Bylaws as a city ordinance, it would have been a violation of the Warner Cable franchise agreement for the City to authorize Access Houston to charge mandatory access fees to users or to deny users cablecast access on the ground that they had not paid a fee. Thus, in 1986, and in 1988 when Access Houston implemented its mandatory fee, Access's decision represented a clear violation of the Warner Cable franchise agreement.

However, the City of Houston renewed Warner Cable's franchise agreement in 1993. In lieu of the relative pith of the 1979 franchise agreement on the subject of PEG channels, the 1993 franchise agreement contains six pages of rules concerning what may be cablecast, what must be cablecast, the technical requirements for programming, the conditions and terms upon which PEG airtime is provided, and prohibitions on the broadcast of certain forms of illegal or unprotected speech. Unlike the 1979 agreement, which provides that access to PEG airtime must be provided on a "nondiscriminatory . . . first come. first serve[d]" basis, the 1993 franchise agreement expressly requires discrimination in favor of locally produced programming in allocating airtime. The 1993 franchise agreement is absolutely silent on the question of whether access to PEG airtime must be provided "without charge," or whether charges may or must be imposed.

In response to the Court's previous order, both Access Houston and the City of Houston have pointed out that the Warner Cable franchise agreement no longer requires PEG

airtime to be provided without charge on a nondiscriminatory first-come, first-served basis. The Court expressly contemplated this possibility in footnote four of its earlier order. Because the franchise agreement has changed, the Court can no longer rely on the franchise agreement as a ground for deciding this case.

II. Analysis of Non-Constitutional Issues

The Court will address Plaintiffs' non-constitutional grounds for summary judgment first because, without exception, the federal courts must adhere to the rule that "if a case can be decided on nonconstitutional grounds, it should be." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 32647, 56 S. Ct. 466, 80 L. Ed. 688 (1936), *reh'g denied*, 297 U.S. 728, 56 S. Ct. 588, 80 L. Ed. 1011 (1936). Therefore, until these threshold questions are resolved, the Court must not decide the issue of whether Plaintiffs' First Amendment rights have been violated by a facially invalid fee rule; nor may it consider whether there is any evidence that the fee rule is unconstitutional as applied.

A. Ultra Vires

The first question presented is whether the mandatory fees Access Houston has imposed on non-local programming are *ultra vires* -- in other words, beyond the power of Access Houston. This analysis affects two determinations: (1) whether the city can be liable to Plaintiffs for constitutional violations resulting from the imposition of the fees if it implicitly authorized such fees; and (2) whether Ac-

cess Houston can be liable to Plaintiffs because of an *ultra vires* decision to impose fees. From its analysis of this issue, the Court concludes that (1) the City of Houston never authorized Access Houston to charge such mandatory fees and, as such, cannot be held legally responsible for any violation of Plaintiffs' rights, and (2) even if Access Houston's decision to charge mandatory fees was an *ultra vires* act, Plaintiff does not have standing to raise this argument and, therefore, it cannot be dispositive of the case.

1. The Issue of Implicit Authorization by the City of Houston

It is at best ambiguous whether the City of Houston intended the silence of the 1993 Warner Cable agreement on the question of mandatory fees to serve as an indication that Access Houston was thereby authorized to impose them. In its briefing, the City of Houston takes no such position. Only Access Houston contends that the City of Houston has provided such authorization. Such an argument is roughly analogous to the rule applied by the federal courts in interpreting statutes that, "[t]he silence of Congress after consideration of a practice by the Executive may be equivalent to acquiescence and consent that the practice be continued until the power exercised be revoked,' *see Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 975 n. 11, 103 S. Ct. 2764, 2796 n. 11, 77 L. Ed. 2d 317 (1983) (White , J., dissenting) (and cases cited therein), *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 115 S. Ct. 2407 (1995), and is not without some persuasive force.

However, it has also long been recognized that "[t]he silence of Congress may provide a treacherous guide to its intent." *Watt v. Alaska*, 451 U.S. 259, 271 n.13. 101 S. Ct. 1673, 1680. 68 L. Ed 2d 80 (1981) *(citing Scripps-Howard Radio, Inc. v. F.C. C.*, 316 U.S. 4, 11, 62 S. Ct. 875, 880, 86 L. Ed. 2d 1229 (1942) ("The search for significance in the silence of Congress is too often the pursuit of a mirage."). Access Houston has not presented the Court with any evidence that the City of Houston actually had the non-local programming fee in mind when the City negotiated the 1993 franchise renewal with Warner Cable. Moreover, by the time the Warner Cable contract was negotiated, the City had appeared *in this very litigation* to disavow that it had ever authorized Access Houston to charge user fees:

> [T]he record is clear that the fee complained of is authorized by the rules of Access Houston, Inc. itself . . . and are <u>not</u> due to any action of the City of Houston .... Plaintiffs fail to allege any facts showing that the City of Houston, rather than the independent corporate entity known as Access Houston, Inc., had any role whatever in promulgating, authorizing, or enforcing Access Houston's fee requirement or other procedural rules in any fashion, as to Plaintiffs or anyone else.

Defendant's Motion to Dismiss (Nov. 30, 1992), Dkt. #8, at 4 (emphasis added).

Access Houston relies primarily on language in its Bylaws permitting it to "seek and receive private, federal,

state, county, and other municipal funds.' However, the issue in this case is not whether Access is authorized to "receive private . . . funds." Plainly, if the Nationalist Movement were to donate money voluntarily to Access Houston, then Access Houston could accept it. Rather, Access Houston has attempted to *withhold* access to cablecast facilities from Plaintiffs until they accede to its demands. Therefore, the crucial issue, separate and apart from authorization to accept money from users, is whether Access Houston is authorized to impose this *mandatory condition* for the cablecast of non-local programming. Obviously, authorization to "receive private, federal, state, county, and . . . municipal funds"does not authorize Access Houston to withhold cablecast services in an effort to coerce additional appropriations from the state, local, or federal authorities. Likewise, this language standing alone would not appear to authorize Access Houston to withhold services in an effort to raise funds from private users. Moreover, the Access Houston Bylaws have *never been changed* since 1986, when any authorization to charge mandatory access fees would have violated the franchise agreement between the City of Houston and Warner Cable. Considering the relevant factors, it appears that the City of Houston never authorized Access Houston to charge mandatory fees. Hence, only Access Houston can be held responsible for any violation of Plaintiffs' constitutional rights. *See generally Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338 (1995) (parade organizer's actions in excluding particular groups from marching in parade are not attributable to City, which authorized organizer to conduct the parade).

2. A Determination that Access Houston's imposition of Mandatory fees was an *Ultra Vires* Act is not Dispositive of this Case

Nevertheless, further examination of relevant state law leads the Court to conclude that it cannot decide the case as to Access Houston on the basis of Access Houston's potentially *ultra vires* act. Neither Plaintiff has standing to challenge the actions of Access Houston as *ultra vires* because of the Texas Non-Profit Corporation Act. According to Tex. Rev. Civ. Stat. Ann. .art. 1396-2.03 (Vernon 1980), "Lack of capacity of a [non-profit] corporation shall never be made the basis of a claim or defense at law or in equity." Article 1396-2.03(B) specifies only three narrow categories of persons with standing to object to a non-profit corporation's actions on *ultra vires* grounds. Plaintiffs do not fall within any of those three categories.

B. Statutory Violations

Plaintiffs also contend that Access Houston has attempted to exercise "editorial control" over the PEG channels, in violation of section 531(e) of the Cable Communications Policy Act. As mentioned in the Court's earlier order, Dkt. #46, at 2, 5 & n.3, this prohibition only applies to Access Houston if it is a "cable operator," as defined in the Act. Access Houston does not fall within the definition of "cable operator." *See* 47 U.S.C. § 522(5), (6)(A). Therefore, the Court must reach the constitutional arguments that Plaintiffs have raised.

III. Analysis of Constitutional Issues

A. State Action

Plaintiffs' claims for relief based on constitutional violations are stated under 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The threshold question, therefore, is whether Access Houston is a "state actor" that can deprive Plaintiffs of their constitutional rights under color of law. The Constitution's protections of individual liberty "apply in general only to action by the government;" this "fundamental limitation on the scope of constitutional guarantees . . .avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 619, 111 S. Ct. 2077, 2082, 114 L. Ed,2d 660 (1991); *cf. Wyatt v. Cole*, 504 U.S. 158, 162-64, 168-69. 112 S. Ct. 1827, 1830-31, 1834, 118 L. Ed. 2d 504 (1992) (private entities are subject to 42 U.S.C. § 1983 liability for invoking unconstitutional state law replevin or attachment procedures, but unlike government officials, have no qualified immu-

nity defense).

The Court finds that Access Houston is a state actor because (1) it is not a purely private entity as (a) it is a channel for communication which is open to the public and specially dedicated as a forum for expressive activity and (b) supervision over day-to-day operations has been transferred from a private owner to a government entity; and (2) Access Houston meets the qualifications for a non-profit corporation to be considered part of the government for constitutional purposes.

First, Access Houston has not shown that it is a purely private entity. If Access Houston is purely private, then it cannot violate Plaintiffs' First Amendment expressive rights any more than could the private shopping centers in *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 80-82, 84-85, 100 S. Ct. 2035, 2040-41, 2042, 64 L. Ed. 2d 741 (1980) (protesters' exercise at shopping center of expressive rights under state constitution -- which provides greater protection than federal constitution -- does not constitute compensable "taking" of shopping center owner's property), and *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-70, 92 S. Ct. 2219, 2228-29, 33 L. Ed. 2d 131 (1972) (private shopping center is not a public expressive forum for First Amendment purposes). Purely private entities, by forbidding visitors from engaging in certain expressive activities, will violate individuals' expressive rights only in limited circumstances. *See, for example, Marsh v. Alabama*, 326 U.S. 501 (1946) (where company owned town and that private actor took the place of local government, the private actor engaged in "state action"). However, the

present dispute involves access to private property[6] for expressive purposes only in the sense that the cable infrastructure in Houston has been constructed and is operated by private franchisees such as Warner Cable. While an entire cable system may have characteristics of private ownership, which make it roughly analogous to a private shopping center, *cf Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n,* 512 U.S. 622, 114 S. Ct. 2445, 2464-66, 2469-70, 129 L. Ed. 2d 497 (1994) (addressing argument that "must-carry" rule, requiring cable operators to transmit a specified number of broadcast stations, is subject to the strictest constitutional scrutiny be-

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[6] *But cf. Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. ___, ___, 114 S. Ct. 2445, 2451-52, 129 L. Ed. 2d 497, 62 U.S.L.W. 4647 (1994) ("Cable systems, by contrast [to broadcast stations] rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers. Cable systems make this connection much like telephone companies, using cables or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers. The construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property. As a result, the cable medium may depend on its very existence upon express permission from local governing authorities. See generally *Community Communications Co. v. Boulder,* 660 F.2d 1370, 1377-78 (10th Cir. 1981).'), *reh'g denied,* ___ U.S. ___, 115 S. Ct. 30, 129 L. Ed. 2d 297 (1994).

cause it forces cable operators to utilize their private property to transmit speech not of their choosing) (citing, *inter alia, Pruneyard Shopping Ctr. v. Robbins,* 447 U.S. at 87, 100 S. Ct. at 2044 (1994)); *id.* at 2480 (O'Connor, J., joined by Scalia, Ginsburg, and Thomas, JJ., concurring in part and dissenting in part) (citing same), the PEG channels bear dramatically less resemblance to the private shopping center in *Lloyd Corp.*, than they do to the public sidewalk easement[7] where the Vietnam War protesters were required to conduct their leafleting after being required to leave the interior malls. *See Lloyd Corp.*, 407 U.S. at 566-67, 92 S. Ct. at 2228.

Specifically, the PEG channels resemble public sidewalk easements at an otherwise private commercial site, and thus, are not purely private entities because **(1)** the

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[7] *Cf. Dolan V. City of Tigard*, ___ U.S. ___, ___, 114 S. Ct. 2309, 2313-15, 2321-22, 129 L. Ed. 2d 304, 62 U.S.L.W. 4576 (1994) (addressing, for purposes of the Takings Clause of the Fifth Amendment, a City Planning Commission decision requiring a property owner, as a condition for permission to redevelop her land, to dedicate all land lying within a 100-year floodplain to municipality for use as a greenway, and an additional fifteen feet of land for use as a pedestrian/bicycle pathway); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 828, 107 S. Ct. 3141, 3144, 97 L. Ed. 2d 677 (1987) (regulatory demand for a lateral public easement across a beachfront lot in exchange for a permit to demolish a beach house and build a larger one).

channel or easement is open to the public,[8] *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577- 78, 100 S. Ct. 2814, 2827-28, 65 L. Ed. 2d 973 (1980) ("People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; . . . subject to the traditional time, place, and manner restrictions . . . streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised . . . .") (citations omitted); 47 U.S.C. § 531(a), (b), (e); **(2)** the channel or easement is either specially dedicated or traditionally understood to be a forum for expressive activity, *id.; see also International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678, 112 S. Ct. 2701, 2705-06, 120 L. Ed. 2d 541 (1991), and **(3)** supervision and control over the day-to-day operation of the easement or channel has been transferred from the private owner to a government entity. *See* 47 U.S.C. § 531(b), (d), (e) ("A franchising authority may . . . require as part of a franchise, and may require as a part of a cable operator's proposal for a franchise renewal . . . that channel capacity be designated for public, educational, or governmental use . . . and may require rules and procedures for the use of the channel capacity designated pursuant to this section. . . . [A] cable operator shall not exercise any editorial control over any public, educa-

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[8] Although the PEG channels are open for the public to view programming only in the sense that all cable subscribers have access to them, by every indication in the record, cablecast services are available to the entire community without regard to whether a person or group in fact subscribes to cable.

tional, or governmental use of channel capacity . . . ."). It is pursuant to the federal statutory authorization quoted above, 47 U.S.C. § 531(a), (b), that the City of Houston has made the dedication of specified channel capacity to PEG programming a mandatory precondition for any cable franchise or franchise renewal.

Although the franchise agreements place control over the PEG channels in the hands of the franchisor, the City of Houston, *see, e.g.*, City of Houston Ordinance No. 93-156, § 11 (1993 Warner Cable franchise agreement), the City has elected not to retain day-to-day control over the operation of the PEG channels. Rather, it has assigned operation and management of the access channels to Access Houston, a nonprofit corporation created solely for that purpose. *See* City of Houston Ordinance 94-986, §§ 1.01, 2.01(I) (contract between the City of Houston and Access Houston). Additionally, every quarter the City transfers a substantial portion of the cable franchise fees it receives to Access Houston for the purpose of funding Access's operating budget. *Id.* §§ 3.01-3.02. All members of the Access Houston Board of Directors are "nominated by the Mayor of the City of Houston and confirmed by the City Council of the City of Houston." City of Houston Ordinance 86-1733, art. VI, § 6 (Access Houston Bylaws).

Second, the mere fact that Access Houston is a nonprofit corporation, as opposed to a department of city government, does not preclude the possibility that it is a state actor for First Amendment purposes. In *Lebron v. National R.R. Passenger Corp.*, the Supreme Court held that the National Railroad Passenger Corporation, or Amtrak,

which was established by Congress and incorporated "as a for profit corporation" under the District of Columbia Business Corporation Act, "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution," even though its authorizing statute declared that Amtrak "will not be an agency or establishment of the United States Government." 513 U.S. 374, 115 S. Ct. 961, 970-74 (1995). The Court held that where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment. . . ." *Id.* at 971, 973. For constitutional purposes, Access Houston, which is a nonprofit corporation created by city ordinance, solely for the purpose of advancing local, and other, governmental objectives, and which is controlled by a board whose members are all appointed by the Mayor of Houston and approved by the City Council, is not distinguishable from Amtrak in any material way. Therefore, the Court finds that Access Houston is a state actor for constitutional purposes.[9]

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[9] It should be noted that because Access Houston is a state actor which operates an expressive outlet available to the general public, its exclusion of particular speakers or viewpoints from that expressive outlet cannot be justified on the ground that the exclusion is itself a protected First Amendment expressive activity. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S.

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B. Summary Judgment Standard

Summary judgment may be entered if the pleadings and evidence on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 25 53, 91 L. Ed. 2d 265 (1986); *Wallace v. Texas Tech Univ.*, 80 F. 3 d 1042, 1046-47 (5th Cir. 1996). When the movant is the defendant, it may rely on the absence of evidence to support an essential element of the plaintiffs case. *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2553; *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995). If the movant carries its burden, the nonmovant must then designate specific facts showing a genuine issue for trial. *Wallace*, 80 F. 3d at 1047; *Little v. Liquid Air Corp.*, 37 F. 3d 1069, 1075 (5th Cir. 1994).

C. Analysis of First Amendment Issues

1. *Forsyth County, Ga. v. The Nationalist Movement*

557, 115 S. Ct. 2338 (1995) (Supreme Court not presented with question of whether 'state action' nexus is satisfied by city-authorized parade sponsor's exclusion of contingent from parade due to contingent's expressive message, and therefore defers to determination below that the sponsor's actions represent purely "private conduct').

Plaintiffs argue that Defendants have violated their First Amendment expressive rights by charging them a fee because *Airlink* is produced "elsewhere" than in the Houston SMSA. In supporting their facial challenge to the mandatory fee rule, Plaintiffs primarily rely upon *Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992), although they cite other authority in a seemingly scatter-gun fashion. Not surprisingly, Plaintiff s counsel represented the Nationalist Movement in the *Forsyth County* case, and he now attempts to cast this dispute in a *Forsyth County* mold. However, what the Supreme Court found objectionable in *Forsyth County* was the arbitrary discretion that a parade permit fee rule placed in the hands of a county administrator. *See id.* at 133-34, 112 S. Ct. at 2401, 2403-04. In *Forsyth County*, the challenged ordinance granted a county administrator authority to set the amount of a parade fee anywhere between one dollar and $1000.00, *see id.* at 126, 112 S. Ct. at 2399, and permitted the administrator to "adjust the amount . . . in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order . . . ." *Id.* at 126, 132-33, 112 S. Ct. at 2399, 2402. Thus, the Court was concerned that the ordinance would often require that the fee be based on the content of the speech. *See id.* at 126, 112 S. Ct. at 2398-99, 2402-04 (noting that the ordinance itself was passed "as a direct result" of two civil rights marches in Forsyth County, the first of which ended when members of a Nationalist Movement affiliate and the Ku Klux Klan threw rocks and beer bottles at the marchers, the second of which occurred the following weekend and became "the largest civil rights demonstration in the South since the

1960s").

Although Plaintiffs strive to identify as many hypothetical borderline cases as possible in an effort to demonstrate that Access Houston administrators exercise some discretion in administering the fee rule for non-local programming, *See* Dkt. #16, the Access Houston fee does not vest any administrator with such discretion that a *Forsyth County* facial challenge would require Access Houston's fee to be held invalid. "In evaluating [a] facial challenge, [the Court] must consider the [government entity's] authoritative constructions of [its own rule], including its own implementation and interpretation of it." *Id.* at 131, 112 S. Ct. at 2402 (citing authorities). In the present case, Access Houston has specified that it defines "produced elsewhere" to mean that 50 percent or more of the footage to be shown was shot outside the greater Houston SMSA. Hence, Access has established a clear line to guide whatever discretion an administrator might exercise. Moreover, the administrator has no discretion to set the amount of the fee; the amount is fixed and depends solely on two rather clear-cut determinations -- whether an individual or a group has submitted a program, and where the program was produced. Hence, the Access Houston fee rule does not raise any of the potential censorship concerns associated with the *Forsyth County* parade fee.

Plaintiffs, of course, contend that no matter how clear Access Houston's policy may appear on paper, in actual practice Access Houston applies it in a discriminatory and constitutionally impermissible manner. However, such an argument has no place in a *facial* challenge to the Access

fee rule.

2. The Content Neutrality of the Fee Rule and the *O'Brien* Standard of Review

The threshold question in analyzing the constitutionality of this rule is to determine, under applicable First Amendment precedent, what standard of review to apply. In *Turner Broadcasting v. F. C. C.*, the Supreme Court analyzed a "must carry" rule, which required cable operators to transmit a specified number of local commercial and public broadcast stations, and determined that such a content-neutral regulation is subject to the *O'Brien* intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. *See Turner Broadcasting*, 512 U. S. 622, 662, 114 S. Ct. 2445, 2469-72 (1994). Under *O'Brien*, a content-neutral regulation will be sustained "[1] if it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to that interest." *Id.* (quoting *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679). The Court determined that the "must carry" rules were content-neutral for three reasons: (1) "[t]he rules impose obligations on all operators [and] . . . [n]othing in the act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select"; (2), while "[t]he must-carry provisions also burden cable programmers by reducing the number of channels for which they can compete . . . this burden is unrelated to content, for it extends to all cable program-

mers irrespective of the programming they choose to offer viewers"; and (3) "the privileges conferred by the must-carry rules are also unrelated to content." *Id.* at 2460.

Significantly, another court has evaluated other cable regulations, which are similar to those in the present case as they supported "localism," and determined that they should be analyzed under *O'Brien*'s intermediate scrutiny test. See *Chicago Cable*, 879 F.2d 1540, 1550- 51 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). In *Chicago Cable*, three cable companies sought restitution of fines they had paid to a local cable regulatory commission for violation of the "local origination," or "LO," provisions in their franchise agreements. *Id.*, 879 F.2d at 1542 (the franchise agreements mandated nine hours of local programming which was to be produced by the individual cable system within the city of Chicago; Chicago Cable unsatisfactorily sought to fill this "LO" time with shows produced by affiliated cable systems in Chicago suburbs and shows produced within the city of Chicago by non-affiliated cable systems). The court held that it was constitutional for the local cable regulatory commission to require the cable operators to produce the mandatory LO programming in Chicago. *See id.* at 1547-51.

In reaching its decision, the *Chicago Cable* court applied the familiar test from *United States v. O'Brien*, 391 U.S. 367 (1968), and concluded first that the Chicago "LO" rule was related to the "important or substantial [government] interest" of "[e]ncourag[ing] . . . 'localism.'" *Id.* at 1549 (citing *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454-62 (D.C. Cir. 1985)). The *Chicago Cable*

court reasoned that "[p]romotion of community self expression can increase direct communication between residents by featuring topics of local concern. . . . [and t]he important qualities embodied in the term "localism" (community pride, cultural diversity, etc.) ... may require original cable programming specifically concerning the locality and directed at the locality's residents." Second, the court found that the LO "restrictions were 'no greater than is essential for the furtherance of that interest.'" *Id.* at 1550 (quoting *Quincy Cable*, 768 F.2d at 1459 (quoting *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679)). Interestingly, the court found that *O'Brien* was satisfied even though the LO requirements were "content-related." *Id.* at 1550 ("[B]urdens of this kind are not invalid just because there might be some less burdensome alternatives. 'So long as the neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, " an incidental burden on speech is permissible under *O'Brien.*"').

Under *Turner Broadcasting* and *Chicago Cable*, the Court is convinced that the mandatory fee rule is valid under the *O'Brien* test. The local programming requirements imposed by the City of Houston on Access Houston are similar to the local content rules which were approved in *Chicago Cable*. Additionally, the Access Houston fee, like the LO provision, was established for the avowed purpose of "encouraging . . . localism," *see* Dkt. #24, at 6-7. But unlike *Chicago Cable*, in this case, the imposition of mandatory fees on programs produced outside of the Houston area is a content-neutral regulation. The fee rule fosters "localism," but not in a content-related way. There is no

requirement that the programming concern a local issue or feature local matters in any way. Furthermore, the "speakers" themselves need not be local. All that is required is that the program be produced in Houston, thereby encouraging localism in the form of local jobs and the encouragement of local involvement in production. In fact, even programs which address exclusively local issues and which are submitted by local residents may still be charged a fee if the production takes place outside of Houston. That the mandatory fee rule is content-neutral is, therefore, quite clear. Thus, the rule qualifies for intermediate scrutiny under *O'Brien*. For the reasons stated below, application of the *O'Brien* test reveals that the mandatory fee rule is facially constitutionally valid.

First, the *Chicago Cable* court specifically recognized the promotion of "localism" or "community self-expression" as an "important" government interest. 879 F.2d at 1549-50. In fact, even the members of the Supreme Court who dissented in *Turner Broadcasting* recognized that the promotion of localism may be an important government interest. *See Turner Broadcasting*, 512 U.S. at 622, 114 S. Ct. at 2478 (O'Connor, J., joined by Scalia, Ginsburg, and Thomas, JJ., dissenting) (although the dissent believed that "localism" cannot qualify as a compelling interest, they did state that "[i]t is a legitimate interest, perhaps even an important one [which] certainly the government can foster . . . by, for instance, providing subsidies from the public fisc"). Therefore, just as the *Chicago Cable* court recognized localism as an important government interest satisfying part of the *O'Brien* test, this Court recognizes the important interest in localism in this case.

With respect to *O'Brien*'s second criteria, this important government interest is unrelated to the suppression of free expression. This is clear from the fact that the mandatory fee rule is content-neutral. In fact, it is more clear in this case that the regulation is unrelated to the suppression of free expression than it was in *Chicago Cable*, since the *Chicago Cable* court recognized that the local-content requirements were "content-related." Here, there is no restriction on the content of one's expression; the fee is based only on the place of production.

Finally, the incidental restriction on alleged First Amendment freedoms, which potentially results from the imposition of a mandatory fee for the broadcast of non-local productions, is no greater than is essential to the important interest in "localism." Significantly, whereas the *Chicago Cable* court upheld a local regulation that required *all* LO time to be filled with locally- oriented and locally produced programming, the Access Houston rule results in a substantial amount of non-local programming for the PEG channels which are restricted not by their "locally oriented" content, but only by the imposition of the fee. The imposition of the fee is a simple, content-neutral way of promoting local production. Furthermore, it is consistent with the other preferences given to locally-produced programs, preferences with which the Plaintiffs do not quarrel. Therefore, the mandatory fee rule satisfies the *O'Brien* test on its face and Plaintiffs' summary judgment motion must be denied.

Moreover, Defendant Access Houston's motion for summary judgment must be granted because Plaintiffs

have offered no evidence that the fee rule is unconstitutional as applied. In particular, Plaintiffs have failed to establish a fact issue as to whether Access Houston has applied the fee rule in a discriminatory way to programs which are "produced elsewhere." In an effort to persuade the Court that an administrator of the fee rule might have discretion in applying the fee rule, the Plaintiffs pose many hypothetical situations that indicate the danger of discretion. But such hypotheticals are potentially relevant only to *Plaintiffs'* facial challenge; with respect to *Defendant's* motion for summary judgment, Plaintiffs have failed to show that Access Houston treated non-local productions differently, by discriminating on the basis of content when applying the fee rule. Rather, Thomas J. Cantrell, executive director of Access Houston, has repeatedly asserted (1) that he makes *no* determination of whether a program is locally produced because he relies on the applicant's representations of where the program is produced, and (2) that he could not base any fee determination on the content of the programming because he has no way of knowing the content of the program at the time the fee determinations are made. *See* Transcript of Hearing on Temporary Restraining Order, Testimony of Thomas J. Cantrell, Dkt. #34, pp. 13-19. Plaintiffs have not countered Cantrell's assertions with a single instance of discriminatory treatment of non-local programs. Therefore, there is simply no evidence in the record that the fee rule is applied in an unconstitutional way.

IV. Conclusion

Plaintiffs' motion for summary judgment (Dkt. #15) is therefore DENIED. Access Houston's motion for summary judgment (Dkt. #33) is GRANTED. The City of Houston's motion to dismiss (Dkt. #8) shall be treated as a Rule 56 summary judgment motion, see FED. R. Civ. P. 12(b), and GRANTED.

It is so ORDERED. The clerk shall enter this order and provide all parties a true copy.

Signed this 16th day of October, 1997.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE